No. 02-1188

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

E.K. McDANIEL, Warden, Ely State Prison;
JACKIE CRAWFORD, Director, Nevada Department of Prisons;
BRIAN SANDOVAL, Attorney General of the State of Nevada, Petitioners,

v.

JOHN ESPIREDION VALERIO, Respondent.

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ESPIREDION VALERIO, Appellant, vs. THE STATE OF NEVADA, Respondent.

No. 21886

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BY J. Richardson
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

The appellant, John Espiredion Valerio, appeals from the denial of a petition for post-conviction relief. On appeal, Mr. Valerio contends that he was denied the effective assistance of counsel during his murder trial and on direct appeal[1]; he gives several examples of what he considers to be ineffective assistance of counsel during trial and on appeal.[2]

The right to counsel in a criminal case is required under the sixth amendment and applies to the states through the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). This right to counsel necessarily includes the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). To establish a claim of ineffective

[1]In 1988, Mr. Valerio was convicted of first degree murder and sentenced to death. On direct appeal, Valerio challenged the conduct of the prosecutor and challenged admitted photographs of the murder victim on the ground that they were unduly prejudicial. We criticized the prosecutor's behavior but upheld Mr. Valerio's conviction and sentence of death.

[2]In his opening brief, Mr. Valerio also challenges the depravity of mind instruction that his jury received; he contends that the jury was improperly instructed. We agree with the district court that the murder of Karen Blackwell involved torture (or serious physical abuse). In Robins v. State, 106 Nev. 611, 629, 798 P.2d 558, 570 (1990), we recognized that a depravity of mind instruction must include "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself, as a qualifying requirement to [the] aggravating circumstance." In this case, evidence that Ms. Blackwell was stabbed more than forty-five times, had "defensive wounds" on her hands and arms, and died not from one wound but from all wounds combined, satisfies us that she was subjected to torture and/or serious physical abuse before she died. As in Robins, we thus conclude that the depravity of mind instruction in Mr. Valerio's case was not unconstitutionally vague as applied.

assistance of counsel, the defendant must satisfy a two-part test: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984).

We find that although Mr. Valerio's counsel were not perfect, they did not commit any errors so serious that they were not functioning as the counsel required under the sixth amendment. Specifically, we conclude that Mr. Valerio's trial counsel and his counsel on direct appeal performed adequately. With regard to Mr. Valerio's trial counsel, she did not err in asking Ms. Gagliardo about her car; and, when the prosecution asked more specific questions about the car, Mr. Valerio's trial counsel immediately objected, and the question was withdrawn.

In addition, Mr. Valerio's trial counsel did not err in failing to question Ms. Gagliardo about the death of her husband more than fourteen years earlier: Ms. Gagliardo was never charged with the offense. Similarly, Mr. Valerio's trial counsel's failure to object to the testimony of Ms. Blackwell's daughter was not a serious error. The daughter was the last person to see Ms. Blackwell before she disappeared; in addition, the daughter was called as a witness to identify her mother's keys. Further, Mr. Valerio's trial counsel did not err in failing to procure the photographs that Maria and Charles Lanham had viewed. These photographs had no probative value, as Maria Lanham, the only person who saw someone exit Ms. Blackwell's car, never identified anyone in the photographs as a suspect. In addition, Ms. Lanham testified at trial that she had seen a man exit Ms. Blackwell's car. We conclude that Mr. Valerio's

other claims of ineffective assistance of trial counsel are also without merit.

With regard to Mr. Valerio's counsel on direct appeal, we also conclude that Mr. Valerio's claims of ineffective assistance lack merit. Specifically, it was reasonable for Mr. Valerio's appellate counsel to focus on the penalty phase of his trial.[3] In addition, we find that Valerio has not shown that he was prejudiced by his counsels' performances. Accordingly, we

ORDER this appeal dismissed.

Mowbray, C.J.

Springer, J.

Rose, J.

Steffen, J.

Young, J.

cc: Hon. Myron E. Leavitt, Judge
Hon. Frankie Sue Del Papa, Attorney General
Lynn R. Shoen
Rex Bell, Clark County District Attorney
James Tufteland, Chief Deputy District Attorney
William P. Henry, Deputy District Attorney
Loretta Bowman, Clerk

[3]Although Mr. Valerio claims that his appellate counsel stated that Mr. Valerio had received a fair trial, appellate counsel agreed that, on balance, the guilt phase of Mr. Valerio's trial was fair. Mr. Valerio's trial counsel, however, concentrated on the penalty phase of Mr. Valerio's trial and continually asserted that this portion of the trial was not fair.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,

Petitioner-Appellant,

v.

ROBERT BAYER, et al.,

Respondents-Appellees.

Case No. 98-99033
D.C. No. CV-N-96-362-HDM

(DEATH PENALTY CASE)

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SUPPLEMENTAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT

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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. ROBERT BAYER, et al., Respondents-Appellees.	Case No. 98-99033 D.C. No. CV-N-96-362-HDM (DEATH PENALTY CASE)

SUPPLEMENTAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT

1. After granting rehearing en banc, this Court ordered further briefing on the procedural default issues presented in this case. This Court should issue a certificate of appealability in order to address those issues. Fed. R. App. Proc. 22(b)(2); 28 U.S.C. § 2253(c); see, e.g., Schell v. Witeck, 218 F.3d 1017, 1021 n. 4 (9th Cir. 2000) (en banc).[1]

[1] In the amicus brief in support of the petition for rehearing, and in a supplemental brief filed on October 13, 2000, amicus showed why the certificate of appealability (COA) provisions of Circuit Rule 22-1 cannot properly be applied to bar consideration of appellant's procedural claims, and amicus continues to rely on the arguments presented there. Since that briefing was filed, this Court issued an amended decision in United States v. Zuno-Arce, 245 F.3d 1108 (9th Cir. 2001) from which Judge Browning dissented, noting that the application of Rule 22-1 was at least (continued...)

Under Slack, this Court takes a "quick look" at the substantive issues which were barred under a challenged procedural ruling[2] to determine if at least one

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[1](...continued)
unclear, and citing an unpublished decision in which a panel of this Court had held that the rule did not apply to cases (like appellant's) in which the notice of appeal was filed before the adoption of the rule. 245 F.3d at 1109, citing Mathis v. Ducharme, 1999 WL 273419 (9th Cir. March 22, 1999). To the extent that it can be considered due to its citation in a published opinion, Mathis supports appellant's position that it was at least unclear that he was required to try to comply with Rule 22-1, since the fact that the 35-day period for moving to expand a COA had already expired in his case before Rule 22-1 itself was adopted.

Further, in Petrocelli v. Angelone, 242 F.3d 867 (9th Cir. 2001), this Court issued a COA in a case governed by Slack v. McDaniel, 529 U.S. 473 (2000) and addressed the petitioner's procedural and substantive claims. The court made no reference to a bar under Circuit Rule 22-1, despite the state respondents' opposition to the appellant's motion to issue a COA on the ground that the motion was filed more than thirty-five days after the Slack decision and therefore was barred by Rule 22-1. JN. Exs. 4, 5; 242 F.3d at 880. Petrocelli, like the other cases following the COA rule change imposed by Slack, demonstrates the unreasonableness of applying Rule 22-1 retroactively to bar all consideration of issues in a capital habeas case which was already pending in this Court when the rule was adopted.

[2] The claims barred by the district court's procedural default ruling included numerous claims of ineffective assistance of counsel, including claims of failure to investigate and present mitigating evidence; failure to investigate alibi evidence or file a notice of alibi; and evidence of another suspect whom the victim had agreed to testify against as part of her own plea negotiation. CR 5 (claims 16B, D, L, Z). The claims barred by the abuse of the writ ruling were claims of ineffective assistance and failure to disclose evidence of another apparent suspect, where the defendant maintained his innocence and the trial court ordered disclosure of the evidence. CR 23 (claims 16-H, 17-M, 25). These claims are at least as arguable as those found to satisfy the "modest standard" for issuing a COA in Lambright v. Stewart, 220 F.3d at 1028-1030 (claims of failure to investigate and present mitigating evidence; failure to give instruction on lesser included offense where significant and compelling of higher offense present).

substantive claim satisfies the COA standard. E.g., Lambright v. Stewart, 220 F.3d 1022, 1026 (9th Cir. 2000). Since a "quick look" at the facial allegations of the underlying claims indicates that they do have some substance, this Court must proceed to address the propriety of the district court's procedural rulings. The district court clearly erred in dismissing claims under the abuse of the writ doctrine, where the previous federal habeas petition was dismissed without prejudice for exhaustion, and reversal on this ground is required by the holding in Slack. Petrocelli v. Angelone, 248 F.3d 877, 885 (9th Cir. 2001). This Court has requested further briefing on the validity of the state default rulings relied on by the district court, and that question is addressed in appellant's supplemental brief and this brief.

2. The Nevada Supreme Court's default rulings in this case, on which the district court relied in finding appellant's claims procedurally barred, are not adequate to bar federal review, because they do not identify to which particular claim each default ruling applied.

Before a federal court analyses the adequacy of a state court ruling to bar federal review, it must determine whether the state court "clearly and expressly" made a "plain statement" that it was relying on a state procedural rule as the basis of its judgment. Harris v. Reed, 489 U.S. 255, 263 (1989). Linking the rule relied upon with the individual claim purportedly barred is required because the federal court cannot perform its task of assessing the adequacy and independence of any default

ruling without knowing to what claim it supposedly relates: the federal court must consider, as a federal question, a range of issues relating to the adequacy of the default ruling itself and its independence of federal law, including, for instance, whether the petitioner actually violated the cited procedural rule with respect to the particular claim, whether the cited rule was in effect at the time of the alleged default, whether the petitioner substantially complied with the rule, and other relevant issues, 2 James S. Liebman and Randy Hertz, Federal Habeas Corpus Practice and Procedure § 26, 2d at 1049-1074 (3d ed. 1998); see, e.g., Hoffman v. Arave, 236 F.3d 523, 530-531 (9th Cir. 2001) (analyzing adequacy of particular default rule to ineffective assistance of counsel claim); Lambright v. Smith, 241 F.2d 1201, 1203-1206 (9th Cir. 2001) (same) If the state ruling does not identify the individual claim and the particular default rule, the federal court cannot consider those issues, and is in danger of having to excogitate a basis for a procedural default ruling that the state court has not specified. See Bargas v. Burns, 179 F.2d 1207, 1218-1219 (9th Cir. 1999) (Tashima, J., dissenting). That identification is also critical because some rules that state courts characterize as "default" rules - - such as a preclusion bar to raising claims previously ruled upon - - are not bars to federal review at all. E.g., Ylst v. Nunnemaker, 501 U.S. 797, 805-806 (1991).[3]

[3] This problem has particular force with respect to Nevada capital cases. The Nevada Supreme Court is required to conduct mandatory review of certain issues on (continued...)

This Court has repeatedly recognized that a ruling that cites "mixed arguments of preclusion and waiver with respect to . . . claims [does] not clearly base its decision on independent and adequate state law grounds." Lambright v. Stewart, 241 F.3d 1201, 1206 (9th Cir. 1999), quoting Poland v. Stewart, 169 F.3d 573, 574 n. 10 (9th Cir. 1999), quoting Ceja v. Stewart, 97 F.3d 1246, 1253 (9th Cir. 1996). Similarly, in Calderon v. United States District Court (Bean), 96 F.3d 1126, 1131 (9th Cir. 1996), this Court held that the California Supreme Court's order was "ambiguous" and

> "does not specify which of Bean's thirty-nine claims the court rejected under [the religitation preclusion rule] and which it rejected under [the waiver by failure to raise previously rule]. '[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review.' Morales, 85 F.3d at 1392 (citing Siripongs v. Calderon, 35 F.3d 1308, 1317-18 (9th Cir.

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[3](...continued)
direct appeal in capital cases. Nev. Rev. Stat. § 177.055(2) (b, c, d) (requiring court to review sentence and determine whether sentence excessive, evidence supports aggravating factors, and sentence imposed under influence of "passion, prejudice or any arbitrary factor"). The Nevada Supreme Court does not always indicate what it has reviewed: for instance, on direct appeal in Bejarano v. State, only a search issue was raised, see Request to Take Judicial Notice (JN) Exs. 6, 7, 8, and the Nevada Supreme Court opinion simply recited the language of the mandatory review provision. JN Ex. 9. On appeal from the denial of post-conviction relief, however, the court rejected specific constitutional attacks on the aggravating factors on the ground that they had been rejected on direct appeal, despite the fact that no constitutional claims had been mentioned in that decision. Bejarano v. Warden, 106 Nev. 840, 841, 801 P.2d 1388 (1990). Under these circumstances, it is impossible to determine which rulings are not bars at all under Ylst (because they treat the claims as previously-raised), and which rulings are directed to claims treated as new claims, from a Nevada default ruling that mixes these theories of default.

1994), cert. denied, 513 U.S. 1183, 115 S.Ct. 1175, 130 L.Ed.2d 1127 (1995))".

The Nevada Supreme Court's ruling in Mr. Valerio's case replicates the problems with the orders at issue in Lambright, Ceja, Poland and Bean. The court invoked both preclusion of relitigation bars and waiver bars[4] without distinguishing which rule it was applying to any particular claim, Valerio, 112 Nev. 383, 385-388, 915 P.2d 874 (1996).[5] Its order is therefore as inadequate to bar federal review of appellant's substantive claims as the orders at issue in this Court's cited cases.

3. This Court granted rehearing en banc in this matter without limitation. The substantive issue resolved in the panel opinion was whether appellant's death penalty could be sustained even though one of the aggravating circumstances was the same depravity aggravator found unconstitutionally vague in McKenna v. McDaniel, 65 F.3d 1483, 1489 (9th Cir. 1995). The Nevada Supreme Court decision does not support a conclusion that the circumstance was in fact narrowed in a way that is constitutionally permissible. The Supreme Court's narrowing jurisprudence requires

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[4] The Nevada default rules include both the preclusion of relitigation bar, and the waiver of claims by failing to raise them in previous proceedings bar, in the same statute. Nev. Rev. Stat. § 34.810 (1)(b), (2).

[5] The court referred to "the grounds among claims 1-18" that were denied as new claims under § 34.810; "those grounds among claims 1-18" that had been previously raised; "the 'old' ground among 1-18"; and "those 'new' grounds among 1-18", id. at 386-388 (emphasis added), without specifying which claims it considered barred by which rule.

a finding of the factor applying the narrowing construction to be made by a state court. E.g., Lewis v. Jeffers, 497 U.S. 764, 771, 776-793 (1990). The terms of the Nevada Supreme Court's decision here, see CR 18-I do not constitute an unambiguous finding: part of the language used purports simply to agree with a legal conclusion made by the trial court; see CR 29-ZZ and the language (that the evidence "satisfies" the court that victim, was subjected to "torture and/or serious physical abuse") is obviously not the equivalent of a finding beyond a reasonable doubt, as state law requires. See Standen v. Whitley, 994 F.2d 1417, 1423 (9th Cir 1993) (Nevada Supreme Court could not find a constitutional error harmless by concluding that substantial evidence to supported conviction).[6]

Second, the terms of the Nevada Supreme Court decision are ambiguous. The reference to "torture and/or serious physical abuse" leaves this Court with no guidance as to whether a majority of the Nevada Supreme Court did in fact agree

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[6] E.g., Geary v. State, 114 Nev. 100, 104-105, 952 P.2d 431, 432 (1998); see Cabana v. Bullock, 474 U.S. 376, 389 (1986) (holding state court's statement did not amount to finding that defendant was actual killer). The Nevada Constitution also explicitly limits the Nevada Supreme Court's jurisdiction on appeal in criminal cases to "questions of law alone." Nev. Const. Art. 6 § 4. Since the Nevada Constitution unequivocally precludes the court from making any factual finding, it would be a violation of due process to allow the state appellate court to uphold a death sentence by making such a finding. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); Cabana v. Bullock, 474 U.S. 376, 386 (1986) (finding to remedy Eighth Amendment violation can be made only by "court that has the power to find the facts"); cf. Canape v. State, 109 Nev. 864, 881-882, 859 P.2d 1023 (1993) (reweighing of aggravating and mitigating factors not precluded by Nevada Constitution)

upon a single construction of the aggravating factor,[7] because the "and/or" terminology is fatally ambiguous. See Richmond v. Lewis, 506 U.S. 40, 51-52 (1992) (state court's decision did not demonstrate constutionally-adequate reweighing under Clemons v. Mississippi, 494 U.S. 738 (1990), because examination of the majority concurring and dissenting opinions did not establish that majority of the court had agreed on how and whether reweighing accomplished).

Third, the Nevada Supreme Court's decision also disregards the state's concession at trial that there was no basis for finding torture. CR 28-LL at 59-62. That concession leaves the state record inadequate to support a finding of the theory of aggravation by an appellate court consistent with due process of law. See Cabana v. Bullock, 474 U.S. at 388 n. 5 (indicating that appellate factfindings may not be permissible in some circumstances). A purported finding of an aggravating factor which is essentially a substitution of a different factor based on a theory that the state conceded at trial did not exist cannot be constitutionally reliable under the Eighth Amendment.

Finally, following the briefing and panel opinion in this case, the Supreme

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[7] The Nevada Supreme Court's decision acknowledged the uncontradicted evidence that the victim died from all the wounds combined, CR 18-I at 1 n. 1, and thus it cannot be assumed that the court applied a construction of "serious physical abuse" that contradicted its own definition, which requires that the abuse be "beyond the act of killing itself."

Court held in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct 2348 (2000), that any fact that increases the punishment to which a defendant is exposed is an element of the offense that must be found by a jury. The jury's finding of the aggravator in Mr. Valerio's case was made under an unconstitutional definition of depravity and it is therefore invalid; and no Nevada court can make the finding in place of the jury under Apprendi.[8] While this Court has not yet determined whether Apprendi applies to cases pending on habeas, Dillard v. Roe, 244 F.3d 758, 773 n. 19 (9th Cir. 2001) the Apprendi rule is clearly a "watershed" rule that must be applied on collateral review, because it affects the proper apportionment of power to juries under the Sixth and Fourteenth Amendment, and without jury findings on all elements of a criminal offense no capital conviction and sentence can conform to the constitutional jury trial guarantee. Hoffman v. Arave, 236 F.3d 523, 547-548 (9th Cir. 2001) (Pregerson, J., concurring). Since mitigating evidence was presented at appellant's trial, the writ must be granted with respect to appellant's death sentence. McKenna, 65 F.3d at

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[8] A finding of an aggravating factor is an "element" of a death-eligible offense in Nevada. Unlike the sentencing structure at issue in Walton v. Arizona, 497 U.S. 639, 649 (1990), the Nevada statutory scheme does not make death or lesser sentences the sanction for first degree murder as such; instead, it provides for a sentence of death "only if" aggravating factors are found. Nev. Rev. Stat. § 200.030(4)(a); see also § 200.030(4)(b) (findings of aggravating factors not necessary to imposition of sentence less than death).

1490.[9]

CONCLUSION

For the reasons stated above, in the briefing previously filed, and in the briefs filed by appellant. amicus curiae submits that this Court should reverse the judgment of the district court denying Mr. Valerio's petition for writ of habeas corpus.

Dated this 17th day of August, 2001.

Respectfully submitted,

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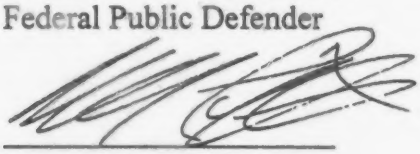

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[9] The unconstitutionality of the language of the Nevada depravity aggravator has been clear since the Supreme Court's decision in Godfrey v. Georgia, 446 U.S. 420, 428, 433 (1980). McKenna v. McDaniel, 65 F.3d 1483, 1489 (9th Cir. 1995); 28 U.S.C. § 2254 (d)(1).

CERTIFICATE OF COMPLIANCE

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Dated this 17th day of August, 2001.

Respectfully submitted,

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I hereby certify that I am an employee of the Office of the Federal Public Defender and on this 17th day of August, 2001, I served a copy of the foregoing **SUPPLEMENTAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT** by mailing a copy thereof to:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,

Petitioner-Appellant,

v.

ROBERT BAYER, et al.,

Respondents-Appellees.

Case No. 98-99033
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(DEATH PENALTY CASE)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,	)	
	)	Case No. 98-99033
Petitioner-Appellant,	)	D.C. No. CV-N-96-362-HDM
	)	
v.	)	
	)	
	)	(DEATH PENALTY CASE)
ROBERT BAYER, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	
	)	

SUPPLEMENTAL BRIEF
OF PETITIONER-APPELLANT

I. INTRODUCTION AND LEGAL PRINCIPLES

The district court dismissed many of Mr. Valerio's constitutional claims based on procedural defaults imposed by the Nevada Supreme Court. This Court reviews that ruling de novo. Morales v. Calderon, 85 F.3d 1387, 1389 n. 6 (9th Cir. 1996).[1]

The Nevada Supreme Court's procedural default rulings imposed in collateral proceedings in capital cases are not adequate to bar federal review of a petitioner's

[1] The arguments made on this issue are legal ones that this Court can entertain on appeal. E.g., United States v. Flores-Payon, 942 F.2d 556, 558 (9th Cir. 1991).

constitutional claims.[2] This Court has already recognized that the Nevada Supreme Court applies default bars based on its successive petition rules in its discretion, Petrocelli v. Angelone, 248 F.3d 877, 888 (9th Cir. 2001); McKenna v. McDaniel, 65 F.3d 1483, 1489 (9th Cir. 1995), but it has not done so with respect to asserted timeliness bars. Moran v. McDaniel, 80 F.3d 1261, 1270 (9th Cir. 1996).[3] This Court should now resolve the tension between Petrocelli, McKenna and Moran by concluding that the Nevada Supreme Court's application of its procedural default rules in Mr. Valerio's case cannot bar review of the merits of his constitutional claims.

This Court must conduct its own survey of the Nevada Supreme Court's

[2] The Nevada habeas statutes include procedural default rules directed against new claims that could have been raised previously, Nev. Rev. Stat. § 34.810(1)(b), and against claims raised again after being raised previously, § 34.810(2). They also require a habeas petition to be filed within a year of the judgment or finality on appeal, § 34.726, and impose a presumption of a bar arising from prejudice to the state if a petition is filed five year after judgment. § 34.800(2). The Nevada Supreme Court has generally defined "cause" to excuse a default as "an impediment external to the defense." E.g., Passanisi v. Director, 105 Nev. 63, 66, 769 P.2d 72 (1989).

[3] In fairness to the Moran panel, it was forced to resolve that question in a total of five days of litigation under an execution warrant; and some of the clear examples of inconsistent or discretionary application, such as the Bejarano decision, arose after the Moran decision. The Moran court also did not address the unpublished dispositions of the Nevada Supreme Court which are before this Court, and it relied on non-capital decisions -- in which the Nevada Supreme Court applies different rules -- in finding that the timeliness rules in capital cases were consistently applied. 80 F.3d at 1270.

decisions applying procedural rules in successor habeas proceedings in capital cases, in order to determine whether application of a procedural default rule is adequate to bar federal review. Fields v. Calderon, 125 F.3d at 764 (determining that California applied timeliness rules inconsistently after "conducting our own survey of . . . cases decided in the nine years preceding and including [the instant] appeal"), citing Johnson v. Mississippi, 486 U.S. 578, 587-589 (1998). Appellant submits along with this brief a request to take judicial notice of all the published and unpublished dispositions of which this Court took judicial notice in Petrocelli. JN Ex. 2.[4] There are thirty-one such dispositions, and review of the decisions shows that the Nevada Supreme Court administers its procedural default rules in a virtually random fashion.[5]

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[4] Pursuant to Fed. R. Evid. 201, this Court may take judicial notice of these court records, and appellant has requested that this Court do so in a motion filed contemporaneously with this brief. Duckett v. Godinez, 67 F.3d 734, 741 (9th Cir. 1995) ("We may take judicial notice of proceedings in other courts, whether in the federal or state systems."); MGIC Indemnity Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986) ("We may take judicial notice of matters of public record outside the pleadings.") Exhibit references in this argument are to the exhibits attached to the request for judicial notice, cited as "JN Ex.". This Court must consider the Nevada Supreme Court's unpublished decisions in its analysis. That court cannot evade the consistency analysis of its dispositions merely by declining to publish them and making them uncitable on whether a state action is published. See n. 5, below.

[5] This case involves only the adequacy of default rulings in successive collateral proceedings in capital cases. The Nevada Supreme Court has held that it applies less stringent procedural default rules in capital cases, as this Court has recognized. Petrocelli v. Angelone, 248 F.3d at 887; see, e.g., Paine v. State, 110

(continued...)

In order for a state procedural default ruling to constitute an adequate state ground for the judgment, it must rest on a state rule that was "clear, consistently applied and well-established at the time of the petitioner's purported default," Calderon v. United States District Court (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996), quoting Wells v. Maass, 18 F.3d 1005, 1008 (9th Cir. 1994); see generally Ford v. Georgia, 498 U.S. 4, 424 (1991); Johnson v. Mississippi, 486 U.S. 578, 587 (1988), so that litigants can properly be charged with knowledge of the standards with which they must comply. The state court system must also apply the default rules consistently, "because the federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce." Siripongs v. Calderon, 35 F.3d 1308, 1317-1318 (9th Cir. 1994); accord Fields v. Calderon, 125 F.3d 757, 760 (9th Cir. 1997); Morales v. Calderon, 85 F.3d 1387, 1389 (9th Cir. 1996); McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995). This rule has an equal protection basis as well: a state's disparate treatment of a single individual compared to others similarly situated, without a rational basis for the difference in treatment, violates the equal protection

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[5](...continued)
Nev. 609, 615, 877 P.2d 1025 (1994) (considering issue despite law of the case "given the gravity of [the] sentence"); Emmons v. State, 104 Nev. 105, 108, 754 P.2d 836 (1988) (dispensing with contemporaneous objection rule "where a life is at stake"); Jones v. State, 101 Nev. 573, 580, 707 P.2d 1128 (1985).

guarantee of the constitution.[6] A default ruling that itself violates the constitution cannot be adequate to bar federal review of constitutional claims. See, e.g., Reece v. Georgia, 350 U.S. 85, 90 (1955).[7]

Most important for analyzing the Nevada situation, however, is the requirement that an adequate bar must be based on a rule, that is, on something that binds the state

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[6] Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); see also Bush v. Gore, 531 U.S. 98, 104-109 (2000) (per curiam) (inconsistent treatment with respect to state law right to vote violates federal equal protection guarantee); Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990). Olech implicitly overrules cases allowing state default rulings to bar consideration of constitutional claims even if the state rule is not consistently applied to all cases, but merely to most cases. See, e.g., Dugger v. Adams, 489 U.S. 401, 411 n. 6 (1989); Moran v. McDaniel, 80 F.3d 1261, 1270 (9th Cir. 1996). If arbitrary application of such a rule to a single individual would violate the equal protection clause under Olech, that ruling could not be an adequate ground, in the constitutional sense, to support the state judgment. This equal protection issue need not be resolved, however, because it is clear that the application of state default rules here is inconsistent and discretionary and therefore inadequate to bar review.

[7] The question whether a default rule was in existence and clearly established focuses on the time that petitioner would have committed the alleged default, because this part of the adequacy analysis depends on the idea of fair notice: barring consideration of constitutional claims on the basis of a rule that did not clearly define the circumstances under which a default would be imposed would violate basic due process principles. The question whether a default rule is consistently applied focuses additionally on the practice of the state courts in ultimately applying the rule, including in the petitioner's case, see Dugger v. Adams, 489 U.S. at 411 n. 6, because this part of the analysis focuses on fair treatment: barring consideration of constitutional claims on the basis of a rule that is applied or not applied to similarly-situated petitioners, without a finding of a rational basis for the difference in treatment, would violate basic equal protection principles

courts to a principled course of action and not a "rule" that is in fact only an occasion for an exercise of unfettered and standardless discretion. Fields, 125 F.3d at 763-764; McKenna, 65 F.3d at 1318; Wells v. Maass, 28 F.3d at 1010; see also Russell v. Rolfs, 893 F.2d 1033, 1035-1036 (9th Cir. 1990) (noting exercise of state court's discretionary power rather than procedural bar).

II. THE NEVADA DISPOSITIONS IN CAPITAL COLLATERAL PROCEEDINGS SHOW THAT DEFAULT RULES ARE APPLIED INCONSISTENLY AND IN THE COURT'S UNFETTERED DISCRETION

The Nevada dispositions in capital cases demonstrate that the Nevada Supreme Court applies or does not apply its default rules without any rational explanation for differing treatment of similar cases and it treats the application of those rules as within its complete discretion.

Bejarano v. Warden (Bejarano II), 112 Nev. 1466, 929 P.2d 922 (1996) demonstrates that the Nevada Supreme Court does not consider itself actually bound by state procedural rules is. In Bejarano, the petitioner filed a second collateral proceeding, and on appeal from the denial of relief, the Nevada Supreme Court invoked every available default rule to bar consideration of the claims, including timeliness, new-claim successiveness, and previously-raised-claim successiveness rules. Id. at 1469-1470. But then, in a footnote on the last page of the decision, the

court decided one issue on the merits.[8] The court gave no explanation for why this claim, which was as untimely and as subject to the new-claim successiveness bar as every other new claim in the petition, had been singled out for review. The only possible explanation for the court's power to review this claim on the merits is that it has the absolute discretion to disregard defaults when it wishes to.

What is true for the treatment of individual claims within a petition is equally true with respect to the treatment of similarly-situated cases. In Hardison v. State, No. 24195, Order of Remand (May 24, 1994), JN Ex. 1-16, a successive collateral proceeding in a capital case that was adjudicated shortly before appellant's, the Nevada Supreme Court reversed a denial of relief in an order which ignored the procedural default rules -- both timeliness and successiveness bars -- that had been raised by the state. JN Ex. 3.[9] Simply disregarding defaults in capital collateral

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[8] "One of Bejarano's claims during his second post-conviction proceeding was that his direct appeal counsel was ineffective. This court has considered this claim and has determined that it is without merit." 112 Nev. at 1471 n. 2.

[9] The Nevada Supreme Court's imposition of procedural defaults does not depend on presentation of that issue to the court. See Farmer v. State, No, 29120, Order Dismissing Appeal (November 20, 1997), JN 1-29 (citing default rules in case decided without briefing on appeal, see Nev. Rev. Stat. § 34.575(3) (habeas appeal submitted on record without briefing or argument unless ordered by court), in which district court had addressed merits of new claims).

proceedings is common.[10]

In Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987), JN Ex. 1-4, the petitioner defaulted his first collateral proceeding by failing to file a timely notice of appeal from the denial of relief. Citing nothing more than the "unique

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[10] Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether failure to present such [mitigating] evidence constitutes ineffective assistance"); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules), JN Ex. 1-18; Farmer v. State No. 22562, Order Dismissing Appeal (February 20, 1992), JN Ex. 9 (denying claim of improper admission of victim impact evidence on merits despite default). See also Nevius v. Sumner (Nevius I) Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986), JN Ex. 1-2 (reviewing first and second collateral petitions in consolidated opinion, without addressing default rules as to second petition); Neuschafer v. Warden, No. 18371, Order Dismissing Appeal (August 19, 1987), JN Ex. 1-5 (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but decided to "elect" to entertain appeal due to "gravity of appellant's sentence"); Ybarra v. Director No. 19705, Order Dismissing Appeal (June 29, 1989), JR Ex. 1-7 (addressing previously-raised claim without reference to default rules); Williams v. State No. 20732, Order Dismissing Appeal (July 18, 1990) JR Ex. 1-8 (addressing claim in third collateral proceeding on merits without discussion of default rules).

The number of decisions in which the Nevada Supreme Court disregards defaults is larger than the decisions themselves indicate, because the court does not always acknowledge its action. E.g., Powell v. State, 108 Nev. 700, 705-706, 838 P.2d 921 (1992) (addressing issue of delay in probable cause determination without indicating that issue not raised at trial or on appeal, see Powell v. Nevada, 511 U.S. 79, 82-84 (1994)); Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) (vacating aggravating factor finding based on instructional error on mandatory review error without noting issue not raised at trial or on appeal)

circumstances" of the capital case, the Nevada Supreme Court dismissed the untimely appeal but directed the trial court to entertain a successive petition. JN Ex. 1-4 at 2. On the appeal from the denial of relief in the second proceeding, the court ignored the timeliness and successive petition default rules that it had anticipatorily dispensed with in its first order. Hill v. State, 114 Nev. 169, 171 953 P.2d 1077 (1998). The court also addressed on the merits a claim that was raised for the first time on appeal from the denial of relief, on the ground that the issue was one of "constitutional dimension which, if true, might invalidate Hill's death sentence and 'the record is sufficiently developed to provide an adequate basis for review'." Hill, 114 Nev. at 178-179 (citation omitted); JN Ex. 1-30. Thus as to this claim, the Nevada Supreme Court disregarded three defaults -- timeliness, new-claim successiveness, and failure to raise the claim in the trial court at all -- without any stated basis for doing so other than the constitutional nature of the claim.

Similarly, in Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995), the court reviewed the merits of claims raised in the first collateral proceeding, over objections based on timeliness and new- and old-claim successiveness bars, in part on the theory that the merits of the claims were related to the issues of cause and prejudice to avoid any asserted defaults. But the court also used unmistakably discretionary language with respect to disregarding the default rules:

> "[T]here appears to be merit to the State's insistence that Bennett has not demonstrated good cause for failing to raise certain issues in prior proceedings and for revisiting issues that have already been decided by this court. . . . Without expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions. . . ."

111 Nev. at 1103 (emphasis added). The Nevada Supreme Court's use of discretionary terms to describe the basis of its disregard of default rules is consistent with its practice in all types of cases.[11]

This pattern is sufficient to show inconsistent application of procedural default rules,[12] and the unfairness of applying them to bar consideration of appellant's claims: Mr. Valerio is also under a capital sentence and he also raises constitutional claims,

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[11] In fact, the Nevada Supreme Court's application of default rules to bar consideration of constitutional issues has always been discretionary. Stocks v. Warden, 86 Nev. 758, 760-761, 476 P.2d 469 (1978) (court "choose[s] to entertain" second post-conviction petitioner which could have been barred); Warden v. Lischko, 90 Nev. 221, 222, 523 P.2d 6 (1974) (trial court's "choice" to rule on barred claim "within its discretionary power"); Gunter v. State, 95 Nev. 886, 887, 620 P.2d 859 (1980) (court "obligated" to consider constitutional issues raised for first time on appeal); Hardison v. State, 84 Nev.125, 128 437 P.2d 868 (1968); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991) ("Normally, a proper objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted).

[12] In six out of thirty-one successive collateral proceedings, or over 18%, the Nevada Supreme Court has simply dispensed with all applicable default rules without explanation. If all the successive capital habeas cases cited above, n. 10, are included, the figure is ten out of thirty-one, or almost a third.

and there is no rational distinction between his case and those in which defaults were disregarded to justify the difference in treatment under equal protection analysis. But the pattern also demonstrates the simpler point: the Nevada Supreme Court treats the application of all procedural default rules as a matter within its complete discretion. There is simply no other way to analyze the issue: if the Nevada Supreme Court can pick out an issue to review on the merits, that is as defaulted as all other claims, (Bejarano II); can ignore default issues altogether, (Hardison); and raise and adjudicate the merits of claims in collateral proceedings sua sponte (Bejarano I); then it is impossible to conclude that the Nevada procedural default bars are based on "rules" that actually bind the court.

In McKenna v. McDaniel, 65 F.3d 1483, 1488-89 (9th Cir. 1995), then-Chief Judge Hug correctly concluded that the Nevada Supreme Court always has discretion to hear the merits of a capital litigant's claims, and thus any procedural default invoked by the Nevada Supreme Court is "at best an exercise of discretion" and is inadequate to bar consideration of the merits of federal constitutional claims. Id. at 1488-89 (citing Pertgen v. State, 110 Nev. 554, 560, 875 P.2d 361 (1994) (holding court would overlook failure to comply with procedural rules governing post-conviction cases because case involved "ultimate punishment" and procedural arguments related to merits).) The cases cited above show that the Nevada Supreme

Court treats the application of the timeliness bar cited in Moran as equally discretionary, and applies it equally inconsistently, as the default rules at issue in McKenna and Petrocelli.

The Nevada Supreme Court's application of the excuses for its default rules exacerbates the arbitrary effect of the application of the rules themselves.[13] In Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997), JN Ex. 1-26, the Nevada Supreme Court held that ineffective assistance of counsel in a post-conviction proceeding would constitute cause if appointment of counsel in that proceeding was mandatory.[14] In McKague v. Warden, 112 Nev. 159, 165 n. 5, 912 P.2d 255 (1996), however, the court enunciated the same rule, but it did not apply it to Mr. McKague, even though his initial post-conviction petition was filed, like Mr. Crump's, before 1987, when appointment of counsel was still mandatory. On the other hand, in Bejarano II, the court held that ineffective assistance of counsel in post-conviction proceedings could not be cause if appointment of counsel was discretionary.

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[13] A court's application of exceptions to its default rules is part of the inconsistency analysis. See Dugger v. Adams, 489 U.S. at 411 n. 6.

[14] Until 1987, appointment of counsel was mandatory in all initial post-conviction proceedings, under former Nev. Rev. Stat. § 177.345(1); from 1987 to 1992, appointment was discretionary in all cases; and beginning in 1993, appointment has been mandatory only in capital cases, under Nev. Rev. Stat. § 34.820(1). 1991 Nev. Stats. ch. 44 § 20 p. 87; 1987 Nev. Stats. ch. 539 § 42 p. 1230.

Bejarano v. Warden, 112 Nev. at 1470. But in Stevens v. State, No. 24138, Order of Remand (July 8, 1994) JN Ex. 1-17, the Supreme Court found cause to excuse a timeliness bar, that was vigorously raised by the state, and found by the trial court, JN Exs. 10 at 4-5; 12, based on a theory of absence of counsel in the initial collateral proceeding when appointment of counsel was not required, and after the petitioner had waived his right to post-conviction proceedings on the record and expressed the desire to pursue federal remedies instead. JN Ex. 1-17 at 2-3.[15] The only possible conclusion from this pattern is that inadequate counsel in a post-conviction proceeding is cause when the Nevada Supreme Court says it is, and not when it says it is not; and the Nevada Supreme Court exercises the same unfettered discretion in applying the exceptions to the default rules that it does in defining and applying the rules themselves.[16] Here again, Mr. Valerio sought to invoke an exception to any

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[15] In its analysis of cause, the court also disregarded its rule that resort to federal proceedings does not constitute cause for delay in filing a state petition. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229 (1989).

[16] This conclusion is not limited to the inadequacy of counsel as cause: in another post-Moran case, the Nevada Supreme Court addressed substantive claims in a successor petition on the ground that continued representation by trial and appellate counsel in the post-conviction proceedings "arguabl[y]" established cause, Nevius v. Warden, Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition (October 9, 1996) JN Ex. 1-24 at 7, which is directly contrary to what it held in Moran. Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996) JN Ex. 1-20 at 8-9.

default rule by asserting ineffective assistance of his first post-conviction counsel, see Valerio v. State, 112 Nev. at 388-389, but he was not given the benefit of the Stevens analysis.

In sum, the Nevada Supreme Court's language and its actions demonstrate that it does not consider itself bound to apply state procedural default rules in capital cases at any stage of the proceedings and that it applies them in its complete discretion. The pattern of its actions also establishes that it applies the default rules inconsistently. On either of these theories, this court must conclude that the Nevada procedural default rules applied in collateral proceedings in capital cases are inadequate to bar federal review of his constitutional claims, and it should accordingly disapprove Moran and follow McKenna and Petrocelli. As Justice Kennedy wrote in Lonchar v. Thomas, 517 U.S. 314, 323 (1996), "'There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges.' Opinion on the Writ of Habeas Corpus, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.)." Mr. Valerio's opportunity for federal review of his constitutional claims cannot depend on the Nevada Supreme Court's "Grace and Favour" in applying its default rules.

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CONCLUSION

For the reasons stated above, in the briefing previously filed, and in the briefs filed by amicus curiae, appellant submits that this Court should reverse the judgment of the district court denying his petition for writ of habeas corpus.

Dated this 17th day of August, 2001.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately space 14-point. The total number of words is 4,822.

Dated this 17th day of August, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Federal Public Defender and on this 17th day of August, 2001, I served a copy of the foregoing **SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT** by mailing a copy thereof to:

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An employee of the Federal Public Defender

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Las Vegas, Nevada

CA NO. 98-99033

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,

Petitioner-Appellant,

vs.

ROBERT BAYER, *et al.*,

Respondents-Appellees.

D.C. No. CV-N-96-362-HDM
(Nevada, Reno)

Appeal from the United States District Court
for the District of Nevada
28 U.S.C. § 2254 Proceedings
(Death Penalty)

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CA NO. 98-99033

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, vs. ROBERT BAYER, *et al.*, Respondents-Appellees.	)	D.C. No. CV-N-96-362-HDM (Nevada, Reno)

APPELLEES' SUPPLEMENTAL BRIEF

Robert Bayer and Frankie Sue Del Papa, Respondents-Appellees ("State" or "Appellees") above-named, by and through counsel, Frankie Sue Del Papa, Attorney General of the State of Nevada, do hereby respond to the court's July 12, 2001 order to file a supplemental brief. This brief is filed pursuant to Fed. R. App. P. 28, 30, 31 and 32, and their counterpart rules found in the Rules of the United States Court of Appeals for the Ninth Circuit.

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I. STATEMENT OF THE ISSUES

(1) Does the Nevada Supreme Court's finding of procedural default for the majority of Valerio's claims rely on "independent and adequate state grounds," in light of *Calderon v. U.S. District Ct. (Bean)*, 96 F.3d 1126, 1131 (9th Cir. 1996)?

(2) Does the Nevada Supreme Court's finding of procedural default constitute an "independent and adequate state ground" given the Ninth Circuit's holdings in *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995); *Moran v. McDaniel*, 80 F.3d 1261 (9th Cir. 1996); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999); *see also Petrocelli v. Angelone*, 248 F.3d 887 (9th Cir. 2001)?

II. ARGUMENT

A. Preface.

In *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001), a unanimous three-judge panel considering the State of California's petition for writ of mandamus in a non-capital habeas proceeding, wrote[1]:

> In a federal habeas action brought by a state prisoner, federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the

[1] The following quote includes citations to cases included in the original as footnote citations.

judgment." Coleman v. Thompson, 501, U.S. 722, 729 (1991)...

For a state procedural rule to be "independent," the state law basis for the decision must not be interwoven with federal law. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983); Harris v. Reed, 489 U.S. 255, 265 (1989). "A state law ground is so interwoven if 'the state has made application of the procedural bar depend on an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed.'" Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000) (quoting Ake v. Oklahoma, 470 U.S. 68, 75 (1985)). To be "adequate," the state procedural rule must be "strictly or regularly followed" and "consistently applied." Morales v. Calderon, 85 F.3d 1387, 1392 (9th Cir. 1996)...

Several years earlier, a different three-judge panel wrote in *Calderon v. U.S. District Ct. (Bean), supra*, a interlocutory capital case appeal:

"The procedural default doctrine is a specific application of the general adequate and independent state grounds doctrine." Wells v. Maass, 28 F. 3d 1005, 1008 (9th Cir. 1994). Under the adequate and independent state grounds doctrine, the United States Supreme Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729, 115 L.Ed. 2d 640, 111 S.Ct. 2546 (1991)...

Not all state procedural bars are "adequate" to foreclose federal review. For the procedural default doctrine to apply, "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." Wells, 28 F.3d at 1010

> (citing Ford v. Georgia, 498 U.S. 411, 424, 112 L.Ed.2d 935, 111 S.Ct. 850 (1991) ("an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied"))(other citation omitted). The reason for these requirements, we have explained, is that "it is grossly unfair—and serves none of the purposes of respect for procedural rules—to forfeit an individual's constitutional claim because he failed to follow a rule that 'was not firmly established at the time in question.'" English v. United States, 42 F. 3d 473, 478 (9th Cir. 1994) quoting Ford, 498 U.S. at 425).

With these general precepts in mind, the Appellees will address each of the questions posed by the court.

B. The Nevada Supreme Court's Finding Of Procedural Default For The Majority Of Valerio's Claims Relies On "Independent And Adequate" State Grounds.

In *Bean*, *supra*, the Ninth Circuit framed the issue as being "whether the procedural rules the California Supreme Court cited in denying Bean's state habeas petition were adequate to foreclose federal review of his claims." The court concluded that "[U]nder *Morales* [*v. Calderon*], California's timeliness rule, at least as applied to a pre-*Clark* procedural default, does not provide an adequate state ground barring federal review on the merits." The *Morales* court seized on the California Supreme Court's acknowledgment that no clear guidelines regarding departure from habeas corpus rules had emerged in past cases. From

this, the *Morales* court concluded that there were no discernible rules and thus the state court's timeliness requirements were not "clear, consistently applied, and well-established" before *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729 (Cal. 1993), was decided. *Morales v. Calderon*, 85 F.3d 1387, 1391 (9th Cir. 1996). From this, the *Morales* court then concluded the rules could "not serve as an adequate and independent ground sufficient to support a procedural default" to cases such as that of Morales, that were decided prior to *Clark*. *Id.* at 1393.

The *Bean* court then went on to note that it would not decide a second argument presented by California, namely, whether the rule of *In re Dixon*, 41 Cal. 2d 756, 264 P.2d 513 (Cal. 1953), was adequate to preclude review, because the California Supreme Court's terse order disposing of Bean's habeas appeal was ambiguous. It so held because the state court's order did not specify which of Bean's thirty-nine claims were rejected under one line of authority that prohibited raising habeas claims that unjustifiably were not raised on direct appeal, or were waived by failure to preserve them at trial, and which were rejected under a different line of authority that prohibits relitigation of claims during habeas corpus proceedings that had already been raised on direct appeal.

The holding in *Bean*, while apposite in a general sense, does not dictate the same conclusion in Valerio's case. The Nevada Supreme Court 4-1 majority

opinion in *Valerio v. State*, 915 P. 2d 874 (Nev. 1996), very carefully described which procedural bars applied to different sets of claims raised by Valerio in his second post-conviction habeas proceeding. The court said:

> As for the grounds among claims 1-18 which have not been determined on the merits, we hold that the district court properly dismissed these grounds pursuant to NRS 34.810 since Valerio could have raised them in his first petition, and his failure to do so constituted an abuse of the writ.
>
> We further hold that the district court did not err in dismissing those grounds among claims 1-18 which had been determined on the merits. These claims may not be raised again because this court's prior orders dismissing them constitute the law of the case. *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). This court specifically considered the issues that Valerio raised in his direct appeal in the order dismissing that appeal...In the order dismissing the appeal from denial of his petition for post-conviction relief, this court concluded that Valerio's claims of ineffective assistance at trial and on direct appeal were without merit...Valerio has failed to show cause why he was raising those claims again...
>
> The district court dismissed grounds 19-24 on the basis that "failure to assert the new grounds in a prior petition constituted an abuse of the writ." The court did not conclude that the direct appeal constituted a "prior petition." The court only concluded that the petition filed pursuant to NRS Chapter 177 was a "prior petition." A petition filed pursuant to NRS Chapter 177 has been considered to be a "prior petition" for purposes of NRS 34.810(2). *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). The district court did not err in considering Valerio's Chapter 177 petition to be a "prior petition" for purposes of NRS 34.810(s).

> ...The district court concluded that the "good cause" for grounds 19-24 was insufficient, where Valerio essentially argued that he forgot to raise these claims earlier...
>
> ...[T]he district court here properly concluded that Valerio's claims were procedurally barred..."

Valerio v. State, 915 P.2d at 876.

It is apparent the Nevada Supreme Court affirmed the denial of Valerio's second collateral attack on the basis of procedural rules specified in NRS 34.810(1) and (2). The relevant portions of the statute were cited in the appellate decision, to the exclusion of any discussion of the so-called merits of any of the claims.

Therefore, unlike the problematic ruling in Bean's case, the Nevada Supreme Court's disposition of Valerio's abusive petition containing procedurally defaulted claims was unambiguous—the court rejected relief solely on the basis of well-established state statutory law. That law required dismissal of second or successive petitions if certain antecedent prerequisites existed: the filing of claims that could have been but were not presented to the trial court, or the filing of claims that were not presented on direct appeal or in a prior petition for post-conviction relief. This court has held that Nevada's statutory scheme clearly requires a petitioner to raise claims in a <u>first</u> post-conviction petition, and that

Nevada's rules are supported by an appropriate "jurisprudential concern" about piecemeal litigation such that dismissal ensues if the rules are not followed. Notably, this court cited statutes and cases dating back to the early 1970's in its holding, implicitly recognizing the long-standing practice adhered to in the Nevada courts. *Bargas v. Burns*, 179 F.3d 1207 (1999).

Second, unlike the problematic ambiguous ruling in Bean's case, the ruling in Valerio's case met the requirement that a procedural default be "separate and independent from any determination requiring interpretation or application of federal law." In other words, it was "purely a question of state law." *Id.*, at 1214. The Nevada Supreme Court discussed and rejected Valerio's various claims of cause—including the alleged ineffectiveness of his first post-conviction counsel—without delving into the merits of his federal claims. This approach was wholly consistent with the holding in *Bargas* and nothing in the state court's disposition contravenes the law of procedural default as set forth in *Bean*.[2] Therefore, this court must conclude the answer to its first query is a resounding "yes" since the Nevada Supreme Court relied on both independent and adequate grounds, within

[2] The *Bargas* court aptly observed that the mere fact a state court issues an alternative holding on the merits "in no way disturbs the independent state law ground for dismissal." In Valerio's last appeal, the Nevada courts did not even go that far since the disposition was solely on procedural grounds.

the context and meaning of *Bean*, when it found Valerio defaulted by raising claims in a second petition without good cause.

C. The Nevada Supreme Court's Finding Of Procedural Default Constitutes An "Independent And Adequate State Ground."

For the reasons stated above and that follow, the State will demonstrate that the holding in *Bargas, supra,* applies even in a capital case context, while the holdings in *McKenna* and *Petrocelli* do not undercut the lower court's determination that certain claims were procedurally barred. To the extent that this court's holding in *Moran* supports a general conclusion that certain procedural defaults are consistently applied in Nevada capital cases, it too applies although the same procedural default at issue in *Moran* is not now under consideration here.

In *McKenna*, this court concluded that the Nevada Supreme Court's exercise of discretion in *Pertgen v. State*, 875 P.2d 361 (Nev. 1994), demonstrated that it had erred by refusing to exercise the same discretion to hear McKenna's claim of error regarding the penalty phase jury instruction on depravity of mind. The circuit court concluded that "[T]he Nevada Supreme Court's statement that McKenna had waived this claim is, thus, necessarily intertwined with its analysis of the merits of McKenna's constitutional claims and does not constitute a clear statement of independent and adequate state grounds for the decision" and thus

that the federal courts were not "barred from examining the merits of McKenna's claims." *Accord*, *Smith v. Stewart*, 241 F.3d 1191, 1196 (9th Cir. 2001).[3] There are several reasons *McKenna* does not apply here.

First, the panel in this case has already addressed the merits of the very issue—the depravity of mind aggravator—on which the *McKenna* panel hinged its decision when it implicitly held that the Nevada Supreme Court had inconsistently applied its default rules. The panel in this case has decided all the issues for which the lower court issued a Certificate of Appealability. Thus, unless and until a COA is issued for any other issue subjected to a default analysis below, any consideration of the questions presented is nothing more than academic.[4]

Second, unlike the California court in *In re Clark*, *supra*, the Nevada Supreme Court has not conceded its application of the rules is inconsistent. Notably, in disposing of Valerio's last appeal the court noted its disagreement with the circuit court's decision in *McKenna* ("contrary to the assertion of the Ninth Circuit, we note this court has not inconsistently applied post-conviction

[3] The rules at issue in *Smith* are completely distinguishable from the Nevada rule at issue in Valerio's case, since Ariz. R. Crim. Pro. 32.2(a) required consideration of a claim's constitutional magnitude.

[4] The panel's now vacated disposition relied on Circuit Rule 22-1, and in the State's estimation, it correctly concluded that "there is no basis for considering uncertified

procedural bars"). It pointed out a significant discriminating factor overlooked or ignored by the *McKenna* panel, that is, that *Pertgen* and other cases require a petitioner to establish good cause and actual prejudice to overcome a procedural default. Thus, the actual holding in *Pertgen* hinged on the Supreme Court's legal conclusion that the petitioner had established cause—ineffective assistance of counsel—during his first collateral attack. As it so happened, unlike Valerio, whose jury found an unassailable second aggravating circumstance (a prior violent felony) and who had the benefit of a narrowing judicial construction of "depravity of mind" when the appellate court considered Valerio's first collateral appeal, Pertgen did not. In conclusion, the *McKenna* panel read too much into the Nevada court's dicta about "the ultimate punishment" and the court's ability to decide claims of plain error or of constitutional dimension *sua sponte.* The *McKenna* court also failed to recognize the unremarkable outcome of the state court collateral appeal in *Pertgen*, one based on a finding of "good cause" due to an

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issues." *U.S. v. Zuno-Arce*, 209 F.3d 1094 (9th Cir. 2000), *amended*, 245 F.3d 1108 (9th Cir. 2001).

ineffective defense lawyer who failed to challenge the constitutionality of his client's sentence at the proper time.[5]

Likewise, the holding in *Petrocelli* does not undercut the lower court's holding that the Nevada Supreme Court's finding of default was both independent and adequate. While the *Petrocelli* court tried to harmonize the decisions in *Moran*, *McKenna* and *Bargas*, giving them all due regard and finding each applicable in at least limited circumstances, the State respectfully submits that much of the reasoning in *Petrocelli* cannot withstand careful scrutiny. First and foremost, the State asserts that the *Petrocelli* court took several Nevada cases and quoted from them out of context. Second, it failed to recognize significant differences in the rules under consideration in each case. Third, it did not conduct an analysis as required by *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989).

Paine v. State, 877 P.2d 1025 (1994); *Flanagan v. State*, 754 P.2d 836 (Nev. 1988); and *Jones v. State*, 707 P.2d 1128 (Nev. 1985), are all irrelevant to the analysis whether NRS 34.810 is regularly and consistently applied because

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[5] The *Pertgen* court actually said that "[U]nder certain circumstances, a valid claim of ineffective assistance of appellate counsel may establish good cause such that we may review apparently meritorious issues that should have been raised on direct appeal. **Under the unique circumstances of this case**, we consider appellant's allegations to be sufficient to overcome this significant procedural hurdle." *Pertgen v. State*, 875 P.2d at 364. (Emphasis added).

they are direct appeal decisions. *Hill v. State*, 953 P.2d 1077, 1083-84 (Nev. 1998), involved a petition for post-conviction relief and not an action pursuant to NRS Chapter 34.[6] *Hill*, 953 P.2d at 1081. Therefore, *Hill* has no relevancy to the analysis.

In summary, quotations from the foregoing cases which were relied on by the *Petrocelli* panel were taken out of their proper procedural context. No case cited by the panel stands for or can be offered for the proposition that the procedural bar found in NRS 34.810 is anything other than adequate.

Second, the panel's analysis of Nevada cases relying on NRS 177.375 was improper. *McKenna* dealt with former NRS 177.375 and not NRS 34.810. Former NRS 177.375 is distinctly different from NRS 34.810. **NRS 34.810 mandates the dismissal**[7] of a petition if the state court makes certain determinations. *See* Statutes of Nevada 1985, 1232; 1987, 457. Former NRS 177.375 did not mandate dismissal. *See* Statutes of Nevada 1967, 1449; 1969, 108; 1973, 438. Rather, the statute stated that the claims were waived. *Id.*

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[6] It is important to understand that for a period of time actions pursuant to NRS Chapter 177 (petitions for post-conviction relief) and NRS Chapter 34 (petitions for writ of habeas corpus (post-conviction)) co-existed, however, each had its own parameters and procedural bars.

[7] NRS 34.810 begins, "The court shall dismiss a petition if the court determines that:..." (Emphasis added).

The panel incorrectly stated that *McKenna*'s holding regarding discretionary application of the relevant procedural bars is supported by Nevada case law. The *Petrocelli* court relied on *Warden, Nevada State Prison v. Lischko*, 523 P.2d 6, 7 (Nev. 1974). *Lischko* has no application because it does not deal with NRS 34.810; it does not deal with a cause of action pursuant to NRS Chapter 34; and it fails to recognize that whatever judicial discretion may have existed with respect to former NRS 177.375(2)(b), such discretion does not apply under NRS 34.810 which ***mandates*** the dismissal of grounds upon certain determinations by the court.

Thirdly, the test for adequacy is whether the state procedural rule has been "strictly or regularly applied evenhandedly to the vast majority of similar claims." *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996), *citing Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989). The precept that the "consistent or regular application" of a state's procedural default rules does not mean undeviating adherence to such rule admitting no exception. *Dugger*, 489 U.S. at 410 n.6 (1989).

The *Petrocelli* panel never specified whether or not NRS 34.810 was faithfully applied to the vast majority of cases raising the same type of constitutional claim in a second collateral attack, as required by *Dugger*. None of the cases relied

on by the *Petrocelli* court even address NRS 34.810.[8] Instead, this court analogized to an entirely different procedural bar, one not relied on by the Nevada Supreme Court in Valerio's case.

III. CONCLUSION

The Nevada Supreme Court's ruling meets the plain statement rule required by *Harris v. Reed* and *Michigan v. Long, supra*. The ruling does not rest primarily on, nor is it interwoven with federal law. Contrary to the conclusion of the *Petrocelli* and *McKenna* panels, the Nevada Supreme Court does not inconsistently apply its procedural default rulings in capital cases. *Bargas v. Burns* and NRS 34.810 fully apply to capital cases and bar consideration of claims not raised in a first petition regardless of the punishment.

RESPECTFULLY SUBMITTED this 16th day of August, 2001.

FRANKIE SUE DEL PAPA
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[8] The State submits that NRS 34.810 is "regularly and evenhandedly" applied in capital cases. *Bejarano v.* Warden, 929 P.2d 922 (Nev. 1996); *McKague v. Whitley*, 912 P.2d 255, 258-60 (Nev. 1996); *Ford v. Warden*, 901 P.2d 123, 127 (Nev. 1995); *Beets v. State*, 871 P.2d 357, 358 (Nev. 1994); and *Hogan v. Warden, Ely State Prison*, 860 P.2d 710, 716 (1993).

STATEMENT OF RELATED CASES

Respondents-Appellees know of two cases that are related to this case. The first case is *Kou Lo Vang v. State of Nevada Attorney General,* Case No. 00-16639 (9th Cir.). It is related to this case in that the adequacy of Nevada's procedural default rules are at issue.

Second is *United States v. Zuno Arce*, Case No. 98-56770, and it is related to this case in that the applicability of Circuit Rule 22-1 is at issue.

RESPECTFULLY SUBMITTED this 16th day of August, 2001.

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)(C), I certify that the supplemental brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with a page or size-volume limitation established by separate court order dated July 13, 2001 and is:

X Proportionately spaced, has a typeface of 14 points or more and contains 3,360 words.

RESPECTFULLY SUBMITTED this 16th day of August, 2001.

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I certify that I am an employee of the Office of the Attorney General and that on this 16th day of August, 2001, I served a copy of the foregoing SUPPLEMENTAL BRIEF by placing said document in the U.S. Mail, postage prepaid, addressed to:

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FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. JACKIE CRAWFORD, Director, et al., Respondents-Appellees.	Case No. 98-99033 D.C. No. CV-N-96-362-HDM (DEATH PENALTY CASE)

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. JACKIE CRAWFORD, Director, et al., Respondents-Appellees.	Case No. 98-99033 D.C. No. CV-N-96-362-HDM (DEATH PENALTY CASE)

I. INTRODUCTION

Pursuant to this Court's order of October 9, 2001, appellant submits the following briefing, showing that the unpublished dispositions support his argument, based on the published dispositions as well, that the Nevada Supreme Court enforces, or declines to enforce, all procedural default rules in capital collateral cases in its unfettered and standardless discretion.

Appellant discussed the law governing the adequacy of state default rules to bar federal review in the previous briefing, Supp. Br. at 2-6, and he will emphasize only these critical points. The requirement that a default rule be "clearly established" and "consistently" and "evenhandedly" applied in order to be adequate to bar federal review includes two principles. The rule must be clear in itself and "clearly

established" at the time the purported default occurred in order to satisfy the due process demand of adequate notice.[1] The rule must also be consistently applied, before or after the purported default,[2] in order to satisfy the equal protection demand of similar treatment of similarly situated litigants.[3] Although previous cases dealing with procedural default have indicated that a default rule may be adequate if it is applied in the "vast majority" of cases, even if not all, e.g., Moran v. McDaniel, 80 F.3d 1261, 1270 (9th Cir. 1996), the decision in Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam) recognizes that a violation of equal protection of the laws may occur if even one individual is treated differently than those similarly situated. These principles make it clear that the procedural rulings in Mr. Valerio's case cannot bar review of his federal constitutional claims: the Nevada Supreme Court has disregarded them in cases indistinguishable from appellant's; it has inconsistently applied them in capital collateral proceedings, fundamentally because it treats them as applicable or irrelevant in its complete, unfettered discretion; and

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[1] E.g., Ford v. Georgia, 498 U.S. 411, 424 (1991); Fields v. Calderon, 125 F.3d 757, 761 (9th Cir. 1997).

[2] See Dugger v. Adams, 489 U.S. at 411 no. 6 (discussing state cases decided after purported default in determining whether rule applied consistently); id. at 419-420 (Blackmun, J., dissenting) (same).

[3] See Myers v. Ylst, 897 F.2d 417, 419, 421 (9th Cir. 1990); see also Hathorn v. Lovorn, 457 U.S. 255, 263 (1982) ("evenhandedly" applied).

thus, no one can know with any certainty what the default rules really proscribe, or how the often-unstated or undefined exceptions to the rules will be applied.

II. THE NEVADA SUPREME COURT APPLIES DEFAULT RULES IN ALL CONTEXTS IN ITS UNFETTERED DISCRETION

The discretionary application of the default rules in capital collateral proceedings is understandable in the context of Nevada procedural rules in general. Nevada does not have a tradition of stringent enforcement of procedural rules: to the contrary, while the Nevada Supreme Court expresses allegiance to procedural regularity, in practice it routinely disregards procedural rules for reasons that it does not express, or that would apply equally to all cases.[4]

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[4] Even in civil cases, the Nevada Supreme Court disregards procedural rules when it wishes to, without identifying bases for its actions that rationally distinguish cases in which default rules are enforced from those in which they are not; nor does its exercise of that power necessarily depend on the presence of a constitutional issue. The court exercises essentially unlimited power to review errors sua sponte. Bradley v. Romeo, 102 Nev. 103, 105, 716 P.2d (1986). See, e.g., Price v. Blaine Kern Artista, Inc., 111 Nev. 515, 519, 893 P.2d 369 (1995) (court revives theory of liability sua sponte, declining "to penalize Price for his attorney's lack of acuity in conceding this issue."); Tahoe Village Homeowner's Assoc. v. Douglas County, 106 Nev. 660, 662 n. 1, 799 P.2d 556 (1990); Boulder City v. Cinnamon Hills Associates, 110 Nev. 238, 244, 871 P.2d 320 (1994) (court exercises its "prerogative" to address constitutional issues "only touched upon in the litigants' briefing papers"); Crow-Speiker #23 v. Helms, 103 Nev. 1, 3, 731 P.2d 348 (1987); Desert Chrysler-Plymouth v. Chrysler Corp., 95 Nev. 640, 643-644, 600 P.2d 1189 (1979) cert. denied 445 U.S. 964 (1980); Western Indus. Inc. v. General Ins. Co., 91 Nev. 222, 230, 533 P.2d 473 (1975); Wilson v. Perkins, 82 Nev. 42, 409 P.2d 976 (1966); Radovich v. W.U. Tel. Co., 36 Nev. 341, 348, 135 P.2d 920 (1913).

The Nevada Supreme Court exercises this "prerogative" in criminal cases, both on direct appeal and on appeal in post-conviction collateral proceedings. On direct appeal in all criminal cases, capital or non-capital, the Nevada Supreme Court has consistently held that it has the power to review constitutional claims despite any default in failing to raise the claim in the trial court, and the court also exercises its power to raise issues sua sponte in criminal cases despite the failure to raise them below or on appeal.[5]

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[5] Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868 (1968) (court "obligated" to review constitutional issues even if not raised below); see, e.g., Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605 (1996) (non-capital); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991); St. Pierre v. State, 96 Nev. 887, 891, 620 P.2d 1240 (1980); McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157 (1983) (non-capital); Paine v. State, 110 Nev. 609, 615, 877 P.2d 1025 (1994); Geary v. State, 110 Nev. 261, 871 P.2d 927 (1994); Emil v. State, 105 Nev. 858, 867 n. 4, 784 P.2d 956 (1989) ("not clear" that contemporaneous objection rule applied in capital cases); Guy v. State, 108 Nev. 770, 785, 839 P.2d 578 (1992); Yates v. State, 103 Nev. 200, 207 n. 8, 734 P.2d 1252 (1987) (non-capital); Jones v. State, 101 Nev. 573, 580, 707 P.2d 1128 (1985); Summit v. State, 101 Nev. 159, 161 n. 2, 697 P.2d 1374 (1985) (non-capital); Natchez v. State, 102 Nev. 247, 251, 721 P.2d 361 (1976) (non-capital); McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157 (1983) (non-capital). In spite of these clear statements, the court applies even this rule inconsistently, sometimes in the same case. See Guy v. State, 108 Nev. at 783, 785 (addressing arguable prosecutorial misconduct not objected to at trial or specified on appeal, but declining to address instructional issue due to failure to object). See also Geary v. State, 112 Nev. 1434, 1438-1439, 930 P.2d 719 (1994) (reversing capital sentence bases on claims raised for first time on rehearing; court "elects" to consider issues beyond scope of order granting rehearing); Lane v. State, 114 Nev. 299, 303, 305, 956 P.2d 88 (1996) (similar); Lane v. District Court, 104 Nev. 427, 447, 760 P.2d 1245 (1988) (addressing due process claim raised for first time on rehearing in "interest of moving toward correct resolution of matter") (non-capital).

The Nevada Supreme Court exercises the same unfettered and standardless discretion in deciding whether to address claims in non-capital collateral proceedings as well.[6] What is true of collateral proceedings in non-capital cases is even clearer in capital cases.

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[6] E.g., Burke v. State, 96 Nev. 449, 451 n. 1, 611 P.2d 203 (1980) (counsel's failure to create record in probation revocation to allow raising of constitutional issue held cause to excuse failure to raise issue before post-conviction petition, despite holding that counsel not ineffective in failing to preserve record); Krewson v. Warden, 96 Nev. 886, 887, 620 P.2d 859 (1980) (same); White v. State, 99 Nev. 760, 761, 670 P.2d 576 (1983) (allegations in post-conviction petition vague but court has power to address constitutional issues raised for first time on appeal from denial of petition); White v. State, 102 Nev. 153, 155-156, 717 P.2d 45 (1986) (addressing claim of invalidity of prior conviction raised on post-conviction, where not raised at trial and no appeal taken by same counsel, and only explanation offered was that counsel had failed to complete investigation of prior before time for taking appeal; no finding of cause based on ineffective assistance); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169 (1991) (claim of ineffective assistance not raised in post-conviction petition addressed on appeal due to "seriousness" of issues); Weaver v. Warden, 107 Nev. 856, 858, 822 P.2d 112 (1991) (addressing claims raised in habeas without discussion of delay in filing petition or failure to file post-conviction relief petition); Passanisi v. State, 108 Nev. 318, 323, 831 P.2d 1371 (1992) (reviewing claim of material mistake of trial court in imposing sentence on appeal from denial of motion to modify sentence, despite failure to raise claim on collateral review); Bridgewater v. Warden, 109 Nev. 1159, 1161, 865 P.2d 1166 (1993) (addressing issues on habeas not raised in post-conviction relief proceeding without discussion of cause); see also Boatwright v. Director, 109 Nev. 318, 849 P.2d 274 (1993) (unappealed dismissal of prior petition held not to bar subsequent petition); Dromiack v. Warden, 96 Nev. 269, 270-271, 607 P.2d 1145 (1980) (failure to appeal denial of post-conviction relief petition not bar to raising same claim in habeas petition); cf. McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255 (1996) (failure to file timely notice of appeal in first post-conviction barred consideration of second petition); Bargas v. Burns, 179 F.3d 1207, 1212 (9th Cir. 1999) (same; no citation to Boatwright or 1980 Dromiack decision).

III. THE UNPUBLISHED DISPOSITIONS IN CAPITAL COLLATERAL PROCEEDINGS DEMONSTRATE THAT THE NEVADA SUPREME COURT APPLIES ITS DEFAULT RULES INCONSISTENTLY AND IN ITS STANDARDLESS DISCRETION

A. Discretionary Application of Default Rules in Unpublished Cases.

The unpublished decisions in successive capital collateral proceedings corroborate what the published dispositions show, that is, that the Nevada Supreme Court does not treat default rules as binding its action whenever it decides not to follow them.

The most obvious example of the Nevada Supreme Court's refusal to treat default rules as binding is Hardison v. State, No. 24195, Order of Remand (May 24, 1994), JN Ex. 1-16.[7] Mr. Hardison filed a petition for post-conviction relief in 1989, alleging the ineffectiveness of trial counsel on a number of grounds relating to the

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[7] In the previous request to take judicial notice, appellant submitted all of the Nevada Supreme Court's dispositions, published and unpublished, in successive collateral proceedings in capital cases up to the time of the briefing in Petrocelli in November, 1998, see Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001), which was essentially contemporaneous with the district court decision in this matter in August 1998. CR #81.

JN refers to appellant's request to take judicial notice of court records and the accompanying exhibits. Supp. JN refers to the supplemental request to take judicial notice of court records and accompanying exhibits, submitted in conjunction with this brief. Supp. Br. refers to the supplemental brief of petitioner-appellant filed on August 17, 2001. Appellant has included a summary of the relevant default statutes in an Addendum to this brief.

determination of guilt. The trial court denied relief, and the Supreme Court affirmed in an unpublished order in 1990. After Hardison sought federal habeas corpus relief he filed another, "amended" petition for post-conviction relief in the trial court, alleging claims of ineffective assistance. The trial court dismissed the petition on procedural grounds,[8] and on appeal the state urged that the claims had been waived under the statutory provisions cited by the trial court. JN Ex. 3 (Respondent's Answering Brief at 16-17).[9] The Nevada Supreme Court vacated the sentence and remanded the case for a new penalty trial in an unpublished order of remand, holding that trial counsel's failure to present any of the available mitigating evidence and his "questionable" closing argument in the penalty phase constituted ineffective assistance. JN Ex. 1-16 at 4-5.[10] The order contains no discussion of, or reference to, any issue of default - - the absence of any statutory authority for filing a second

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[8] It ruled that Hardison had failed to show good cause for filing the post-conviction petition more than one year after the termination of the direct appeal; that he had failed to show cause for again raising the claims which had been raised and rejected in the first post-conviction proceeding; and that he had failed to show cause for failing to raise the new portions of the claim which had not been raised in the first post-conviction proceeding. See JN Ex. 3.

[9] If Mr. Hardison's default is treated as occurring during the pendency of his first petition, in 1989 to 1990, he is similarly situated to appellant Valerio, whose first petition was litigated between 1989 and 1992.

[10] The Nevada Attorney General's list of condemned inmates discloses that Mr. Hardison is now no longer on Nevada's death row.

"amended" post-conviction petition rather than a habeas petition, the untimeliness of the second post-conviction petition, the relitigation of claims previously raised, or the failure to raise the new claims in the first petition, see Addendum at 4-6, below - - or of any theory of cause and prejudice for excusing any of the defaults. See also Nevius v. Director (Nevius I), No. 17059, Order Dismissing Appeal (February 19, 1986) (dismissing appeals from denial of first and second petitions for collateral relief without addressing default rules as to second petition).

The importance of Hardison is not merely as an example of inconsistent application of the default rules; rather, it demonstrates that the Nevada Supreme Court does not consider the default rules as actually constricting its reviews. In Hardison, the trial court relied on statutory default provisions that were in unequivocal terms, see former Nev. Rev. Stat. § 177.375(2) (claims not raised in previous proceedings or raised and rejected "waived" unless cause demonstrated), Addendum at 7, and the state asserted the default rules on appeal.[11] The Nevada Supreme Court did not purport to find cause to overcome the defaults: it simply ignored them. Thus, Hardison shows that the default rules are not treated as rules at

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[11] The Nevada Supreme Court's imposition of procedural defaults does not depend on the state's assertion of default issues on appeal to the court. See Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997), JN 1-29 (citing default rules in case decided without briefing on appeal, in which district court had addressed merits of newly-presented claims.)

all, since the Nevada Supreme Court is not bound to follow them when it does not wish to do so.

The Nevada Supreme Court similarly disregards defaults when it wishes to address individual claims in a successive collateral proceeding, even if it rejects the claims. In Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) JN Ex. 1-9, the petitioner filed a second habeas petition raising a new Eighth Amendment claim. Despite the mandatory language in the habeas statute which was then in effect requiring dismissal of a petition raising new claims, Nev. Rev. Stat. § 34.810(2) (second or successive petition "must be dismissed" if it raises new claims), Addendum at 4-5, the Nevada Supreme Court simply ignored the default rules and addressed the merits. In Ybarra v. Director, No. 19705 (June 29, 1989), JN Ex. 1-7, the court addressed on the merits a challenge to the use of the M'Naghten test of sanity raised for the first time in a second collateral attack, again without addressing any issue of cause for failing to raise the claim in earlier proceedings, or addressing the mandatory dismissal rule of Nev. Rev. Stat. § 34.810 which was then in effect. Accord, Williams v. State, No. 20732, Order Dismissing Appeal (July 18, 1990), JN Ex. 1-8 at 3, (rejecting claim made for first time in third collateral proceeding, on ground that "the record clearly refutes appellant's post-conviction claims.")

In Neuschafer v. State, No. 16815, Order Dismissing Appeal (November 1,

1995), Supp. JN Ex. 4, the capital defendant's first habeas corpus petition was dismissed by the district court with leave to amend. Instead of amending the petition, counsel appealed the dismissal. The Nevada Supreme Court dismissed the appeal, holding that the petition "fail[ed] to articulate a claim based on ineffective assistance of counsel.". Without addressing any potential default issues arising from the failure to raise such a claim in the initial petition,[12] the court ruled that the petitioner would be allowed to file an amended petition in the trial court. Later, in Neuschafer v. Warden, No. 18371, Order Dismissing Appeal (August 19, 1987), JN Ex. 1-5, the court relied on the unexplained "without prejudice" dismissal of the first collateral attack as a basis for addressing the merits of the petitioner's claims, id. at 1, 5, again without indicating any basis for allowing the filing of the subsequent petition.[13] See

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[12] See former Nev. Rev. Stat. § 177.375(2); Junior v. Warden, 89 Nev. 476, 477, 515 P.2d 2 (1973) (bar based on failure to raise claim in previous post-conviction relief petition under former Nev. Rev. Stat. § 177.375 applied to successive habeas corpus petition under ch. 34), Addendum at 3.

[13] The court also did not address the fact that almost two years elapsed between the court's dismissal of the appeal in the first proceeding and the filing of the second petition, while the petitioner had been engaged in federal litigation. See Nev. Rev. Stat. § 34.810(1)(b)(2) (claim barred if not presented in previous petition (in effect since 1985)); former § 177.315(2) (one year limitation on filing post-conviction relief petition); Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229 (1989) (litigating federal petition not cause for delay in filing state petition). Further, the court disregarded the likelihood that the appeal in the second proceedings taken by counsel was not properly before the court, because the petitioner had dismissed counsel in the district court, and "nevertheless elect[ed] not to decide that issue and to treat the appeal as

also Hill v State (Hill I), No. 18253, Order Dismissing Appeal (June 29, 1987), JN Ex. 1-4 (allowing filing of second collateral attack despite failure to perfect appeal in initial proceeding); Supp. Br. at 9.

These unpublished dispositions mirror the Nevada Supreme Court's practices in published decisions. As appellant showed previously, Supp. Br. at 6, 8-9, the published decisions include cases in which the Nevada Supreme Court, without explanation, has simply ignored default rules and addressed claims on the merits. Most obvious among these is Bejarano v. Warden, 112 Nev. 1466, 929 P.2d 922 (1996), in which the Nevada Supreme Court, applied default rules purportedly barring consideration of all of the petitioner's claims, but, without explanation, reviewed one claim on the merits. The state has failed to suggest any rational basis for the distinction in treatment between the claim that was reviewed on the merits, and those the court refused to review.[14] See also Ford v. Warden, 111 Nev. 872, 886-887, 901

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one properly invoking our jurisdiction given the gravity of appellant's sentence." Id. at 6 (emphasis supplied). The point of the court's discussion of counsel's authority to proceed was that Mr. Neuschafer had dismissed counsel in the state district court and it was unclear at that time whether he was volunteering for execution. "Execution Looms for Nevada Inmate," Las Vegas Review Journal 1B, 6B (August 18, 1987)

[14] At oral argument, counsel for the state suggested that the distinction was that default rules had not been asserted as to that claim. That position is inaccurate. In the second collateral proceedings in the state district court and in the Nevada Supreme Court, default rules were not litigated only as to a claim of ineffective

P.2d 123 (1995) (addressing merits of claim attacking adequacy of mandatory review of death sentence on direct appeal, although claim raised for first time on appeal from the denial of a successive collateral petition and other claims in petition held defaulted; no explanation for treating that claim differently); Hill v. State (Hill II), 114 Nev. 169, 171, 953 P.2d 1077 (1998) (addressing merits of claim raised for first time on appeal from denial of second collateral petition, based on power to consider constitutional issues raised for first time on appeal if record sufficiently developed, without applying default rules relied on to reject remaining claims).

The Nevada Supreme Court's action in Hill II is consistent with its sua sponte review of the merits of claims on appeal in collateral proceedings, without regard to default rules. In Bejarano v. State (Bejarano I), 106 Nev. 840, 843, 801 P.2d 1388 (1990), on appeal from the denial of the first collateral petition, the Nevada Supreme Court sua sponte raised and rejected the issue of whether failure to present mitigating evidence constituted ineffective assistance of counsel at trial. Since that claim had not been raised in the post-conviction petition filed in the trial court, it would have been barred, absent a finding of cause, under the then-existing default rules, if it had

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assistance of counsel in the initial post-conviction proceeding, Supp. JN, Exs. 1 at 3, 2 at 4 n. 1, 3 at 3. The claim reviewed on the merits by the Nevada Supreme Court was a different claim, of ineffective assistance of counsel on direct appeal. Id. at 1471 n. 2.

been raised in a subsequent petition.[15] But the Nevada Supreme Court did not even mention, much less apply, these default rules; again it simply ignored them.[16]

B. Discretionary and Inconsistent Application of the Exceptions to the Default Rules.

The application of exceptions to the default rules is also relevant to the adequacy inquiry,[17] and the Nevada Supreme Court's administration of its "cause" requirement to excuse procedural defaults is as confused as its application of the rules themselves. The Nevada Supreme Court has defined cause generally as "an impediment external to the defense," e.g., Passanisi v. Director, 105 Nev. 63, 66, 769

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[15] Former Nev. Rev. Stat § 177.375(2); Nev. Rev. Stat. § 34.810(b)(2)(barring claims not raised in previous proceedings); former Nev. Rev. Stat. § 177.315(2) (requiring filing of initial petition within one year of judgment or disposition on appeal).

[16] Similarly, in Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995), the court exercised standardless discretion in addressing all of the claims raised on appeal from the denial of post-conviction relief, since it concluded that there was merit to the state's procedural arguments barring those claims, but decided that it could "choose" to address the merits anyway. See Supp. Br. at 9-10. But it also rejected a claim of ineffective assistance of counsel for failure to present mitigation, despite the absence of any allegations of what mitigating evidence could have been presented, by sua sponte concluding that it could not "imagine" what evidence could have been presented that would have made a difference. 111 Nev. at 1108. A claim raised in a later petition including specific allegations of such evidence ostensibly would have been subject to the timeliness and successiveness bars, but the Nevada Supreme Court simply pre-empted that inquiry.

[17] See Dugger v. Adams, 489 U.S. 401, 411 n. 6 (1989) (discussing application of exceptions to default rules); id. at 419-420 (Blackmun, J., dissenting) (same).

P.2d 72 (1989), but its decisions dealing with particular issues, particularly with respect to representation by counsel as cause, are inconsistent.

For instance, in Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996), JN Ex. 1-20, the lawyers who represented the defendant at trial and on appeal also represented him in the first state collateral proceedings, in which they raised no claims of their own ineffective assistance. In the subsequent habeas proceeding, the Nevada Supreme Court held that the clear conflict of interest did not constitute cause to allow review of his constitutional claims.[18] Then, in Nevius v. Warden (Nevius II), Nos. 29027, 29028, Order Dismissing Appeal (October 9, 1996), JN Ex. 1-24, the court considered essentially the same situation, held that the conflict "arguably" established cause, and proceeded to address the merits of the petitioner's claims. Most recently, the Nevada Supreme Court decided a non-capital matter, Wade v. State, No. 37467, Order of Affirmance (October 11, 2001), Supp. JN Ex. 5. There, counsel who represented the defendant at trial and on direct appeal filed a habeas petition on his behalf. The district court dismissed the petition because it was not verified, and refused to allow an amended petition to be filed because it was outside the one-year limit of Nev. Rev. Stat. § 34.726. The Nevada Supreme Court

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[18] This court held Mr. Moran's claims procedurally barred on the basis of that ruling. Moran v. McDaniel, 80 F.3d 1261 (9th Cir. 1996).

affirmed the dismissal; but it sua sponte raised the issue of the conflict of interest in trial and appellate counsel filing a habeas petition on the defendant's behalf, without explaining to the petitioner the potential results of representation by previous counsel, and held that the petitioner had cause to have a second habeas petition considered on the merits. Thus the Nevada Supreme Court's jurisprudence establishes that such a conflict so clearly constitutes cause to allow filing of a an untimely and successive petition that the court raises it sua sponte (Wade); that it "arguably" constitutes cause (Nevius); and that it does not constitute cause at all (Moran).

The Nevada Supreme Court has also held, based on federal authority before the decision in Coleman v. Thompson, 501 U.S. 722, 752-754 (1991), that ineffective assistance of counsel in post-conviction proceedings could excuse failure to raise claims. Grondin v. State, 97 Nev. 454, 456, 634 P.2d 456 (1981). Grondin was not explicitly overruled until 1996, Bejarano, 112 Nev. at 1469-1470; McKague v. Warden, 110 Nev. 159, 163, 912 P.2d 255 (1996); and the Nevada Supreme Court has now held in published opinions that ineffective assistance of counsel is not cause for filing a second petition unless appointment of counsel was mandatory in the first proceeding.[19] But between the Grondin decision in 1981, and at least 1996, there was

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[19] Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997); Bejarano v. Warden, 112 Nev. at 1470. Appellant previously showed that the Nevada Supreme Court has not applied this rule consistently even in the published decisions, assuming

no clear authority whether ineffective assistance in post-conviction proceedings could constitute cause.

In an unpublished decision arising during this period, Stevens v. State, No. 24138, Order of Remand (July 8, 1994), JN Ex. 1-17, the initial post-conviction petition was filed in 1989, during the period in which appointment of counsel was discretionary and in the same year as appellant filed his first petition. After a delay in the appointment of counsel, the petitioner sought to dismiss the petition in order to proceed to litigation in federal court. He was canvassed by the trial court and withdrew his petition. Following federal habeas proceedings, Stevens filed a second petition, which was dismissed as untimely. The Nevada Supreme Court reversed the conviction and death sentence on the merits.[20] Although the appointment of counsel was discretionary at the time, the court held that it would have been an abuse of discretion not to appoint counsel to advise Stevens as to the effect of waiving his right to post-conviction proceedings, and thus that there was cause to overcome the

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arguendo that it applies to his case. Supp. Br. at 12-13; compare Crump, supra (ineffective assistance cause if appointment of counsel mandatory) with McKague v. Warden, 112 Nev. 159, 165 n. 5, 912 P.2d 255 (1996) (ineffective assistance not considered cause, although first post-conviction petition filed during same period as Crump, when appointment of counsel mandatory).

[20] The Nevada Attorney General's list of condemned inmates shows that Mr. Stevens is no longer on Nevada's death row.

default in the untimely filing of the second petition.[21] At the time of Mr. Valerio's first petition, the validity of this theory of cause was completely unclear.[22] The Stevens cause analysis (which did not even cite Grondin) is fundamentally inconsistent with the rule applied in Crump, McKague and Bejarano, which was based on the discretionary appointment of counsel, just as the recent Wade decision is inconsistent with Nevius and Moran. In short, the definition of cause amounts, in practice, to whatever the Nevada Supreme Court in its unfettered discretion says it is in any particular case.

IV. THE NEVADA SUPREME COURT'S PUBLISHED AND UNPUBLISHED DISPOSITIONS IN CAPITAL COLLATERAL PROCEEDINGS ARE INCONSISTENT AND ARE BASED ON EXERCISES OF STANDARDLESS DISCRETION

The default rules the Nevada Supreme Court invoked to bar consideration of Mr. Valerio's claims, Nev. Rev. Stat. § 34.810, are the same rules it ignored, without explanation, in Mr. Hardison's case. Mr. Hardison had his claims reviewed, and his

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[21] The court also included the period of time in which federal habeas proceedings were pending as covered by the cause finding, although the court had previously held that the period during which federal habeas proceedings were pending was counted against the time for filing a post-conviction proceeding. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229 (1989).

[22] Even in appellant's own case, the court did not clearly hold that ineffective assistance in post-conviction proceedings would not constitute cause, even though it cited McKague. Valerio v. State, 112 Nev. at 389 and n. 2.

sentence reversed, and he is no longer on death row; but the state contends that Mr. Valerio's death sentence is to be carried out while this Court is precluded from reviewing his constitutional claims at all. The state has never suggested a rational basis for this disparity in treatment; and this alone is sufficient to show that the default rulings in Mr. Valerio's case cannot be adequate to bar federal review, because applying them would violate equal protection under Village of Willowbrook v. Olech.

The Nevada Supreme Court's dispositions also demonstrate that the default rules are applied inconsistently.[23] The only possible conclusion is that, at least in this class of cases, application of the default rules is too inconsistent to bar federal review. While it is possible, of course, to pick out cases in which the default rules have in fact been applied, see Moran v. McDaniel, 80 F.3d at 1270, the cases in which they have not been applied -- sometimes the same cases, like Bejarano and Hill, in which they

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[23] Of the thirty-one dispositions in successive capital collateral proceedings by the Nevada Supreme Court, it simply ignored default rules as to all or some claims in nine (or 29%) of those dispositions (Hardison, Farmer, Ford, Hill II, Bejarano II, Nevius I, Neuschafer, Ybarra, Williams). Adding cases in which the court anticipated and addressed claims that would normally have been raised in successive petitions (Bejarano I and Bennett), and cases in which the court excused defaults on bases that it had refused to recognize in other cases (Nevius II, Stevens), the number is thirteen out of thirty-one (or 42%). Even if the inconsistency shown by some of these cases were debatable, as a whole the dispositions demonstrate that the default rules are consistency applied in the "vast majority" of cases.

are both applied and disregarded - - demonstrate that the Nevada Supreme Court does not treat them as binding unless it wishes to apply them. Addressing a claim on a post-conviction appeal sua sponte, as in Bejarano I, or addressing a claim raised for the first time on appeal in a second post-conviction proceeding, as in Hill II, is fundamentally at odds with any conception of the default rules as actually binding the court.[24] Instead, every application of default rules in these cases results from "at best an exercise of discretion." McKenna v. McDaniel, 85 F.3d 1387, 1391 (9th Cir. 1996); see Petrocelli v. Angelone, 248 F.3d at 886.[25] Under these circumstances, the default rules invoked by the Nevada Supreme Court are not adequate to bar federal review of petitioner's claims. E.g., Martinez v. Klauser, 266 F.3d 1091, 1093-1094 (9th Cir. 2001).

V. CONCLUSION

For the reasons stated above, in the first supplemental brief, and at oral

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[24] Such action also prevents the parties from complying with any statutory pleading requirements, see Nev. Rev. Stats. §§ 34.800(2) (pleading laches), 34.810(3) (pleading cause), which further demonstrates that the court treats statutory rules as irrelevant if it wishes to do so.

[25] Essentially, the Nevada Supreme Court has simply continued its policy of discretionary application of the default rules, despite their codification. Stocks v. Warden, 86 Nev. 758, 760-761, 476 P.2d 469 (1978) (court "choose[s] to entertain" second post-conviction petitioner which could have been barred); Warden v. Lischko, 90 Nev. 221, 222, 523 P.2d 6 (1974) (trial court's "choice" to rule on barred claim "within it's discretionary power").

argument, this Court must conclude that the Nevada Supreme Court applies all procedural default rules in capital cases in its complete and standardless discretion. Accordingly, this Court should reverse the district court's judgment, relying on default rulings to bar review of the merits of appellant's claims and remand the matter for further proceedings.

RESPECTFULLY SUBMITTED this 15th day of November, 2001.

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I hereby certify that I am an employee of the Office of the Federal Public Defender and on this 15th day of November, 2001, I served a copy of the foregoing **SECOND SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT** by mailing a copy thereof to:

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An employee of the Federal Public Defender

No. 98-99033

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, vs. ROBERT BAYER, Director of the Department of Prisons, E.K. McDANIEL, Warden, Respondents-Appellees.	D.C. No. CV-N-96-00362-HDM (DEATH PENALTY CASE)

RESPONDENTS' SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE

Having failed in his first state collateral attack on his conviction, Valerio brought a second attack. In his second attack, he raised a number of new issues, specifically, those found in Grounds 4-8, 10-12, and 18-24, parts b-g, j-l, n-r, t-x and z-kk of Ground 16, and parts a, c, e-i, and k of Ground 17. Because Valerio had not raised these grounds in his previous state collateral attack, they were procedurally barred pursuant to NRS 34.810 and he had the burden of showing good cause why he had not presented them in his earlier attack. The Nevada Supreme Court held that he had not carried his burden and, therefore, the grounds were procedurally barred. Court Record (hereinafter CR) 30, Exhibits FFF and YYY.

The federal district court found that the afore-listed claims were procedurally barred. CR 64, 76 and 79. Valerio has appealed from the district court's denial of his federal habeas petition.

In this appeal, Valerio requested that the court take judicial notice of various exhibits which had not been presented by Valerio either in state court or in federal district court. Respondents opposed the motion. Valerio replied. Valerio's request to take judicial notice was denied.

Following oral argument, the *en banc* court withdrew its previous order denying Valerio's request to take judicial notice of records and granted his request.

This *en banc* court has asked the parties to address in supplemental briefs "the legal significance" of the materials of which the court was now taking judicial notice. Exactly what is meant by "legal significance" is unexplained. In the instant context, where no certificate of appealability has been granted beyond that of the federal district court, many different meanings can be ascribed to such language. Additionally, it is unclear exactly what form the "judicial notice" will take. What relevance is this court going to ascribe to the exhibits or any single one? Respondents will do their best to address the court's order consistent with what Respondents believe to be this court's extra-jurisdictional concerns and Valerio's apparent claim, to wit, that the procedural bar applied in Valerio's case is not adequate because the Nevada Supreme Court does not consistently apply state procedural bars in death cases. As Respondents note below, according to the law of this circuit and that of the United States Supreme Court, Valerio's claim is not proper. The real issue is whether the procedural bar relied upon by the Nevada Supreme Court in Valerio's case, NRS 34.810, is adequate.[1] Notwithstanding that, Respondents do not waive any objections or arguments whatever.

Valerio has submitted his brief. Respondents now submit theirs.

///

[1] As will be shown below, the law of this circuit and the law established by the Supreme Court require that this court not inquire into the adequacy of other defaults that are not at issue.

ARGUMENT

A. This Court Does Not Have Jurisdiction To Consider The Issues That This Court Has Ordered Addressed.

For this court to properly consider the issues in question, a certificate of appealability must have been granted pursuant to 28 U.S.C. § 2253(c). Here, no court has issued a certificate of appealability. Furthermore, Valerio is required to make a substantial showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(2). He has not done so nor has this court required him to do so. As a result, there is no jurisdiction to consider the issues. *Slack v. McDaniel*, 529 U.S. 473 (2000).

B. This Court Is Bound By The Nevada Supreme Court's Determination Of Nevada Law.

A state's interpretation of its own laws is binding on this court. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Pulley v. Harris*, 456 U.S. 37, 41 (1984); *Milton v. Wainwright*, 407 U.S. 371, 377 (1972); *See Hartman v. Summers*, 120 F.3d 157, 161 (9th Cir. 1997); *Moran v. McDaniel*, 80 F.3d 1261, 1268 (9th Cir. 1996).

Recently the Nevada Supreme Court published *Pellegrini v. State*, 34 P.3d 519 (2001), a copy of which is appended hereto and is referenced herein. **That opinion, the statements and conclusions therein constitute the law of Nevada**

which is binding on this court. In its discussion of NRS 34.810, the Nevada Supreme Court stated that it has consistently applied the procedural bars found in NRS 34.810, that the language of NRS 34.810 is mandatory and that it had been consistent in requiring good cause and actual prejudice to overcome that procedural bar. *Pellegrini* at *56 and *57. To the extent that Valerio argues to the contrary, Valerio's argument must be rejected.

C. Valerio Failed To Present His "Evidence" To Either The State Courts Or To The Federal District Court Below. Therefore, This Court Can Not Consider The "Evidence."

Respondents lodge a continuing objection to this court's consideration of Appellant's so-called "evidence" because it was never presented either to the federal district court or to any of the state courts that considered Valerio's case. In short, Respondents object to this court's allowing Valerio to turn this appeal into a one-sided evidentiary free-for-all. The issue(s) that this court wishes the parties to address involves consideration of evidence that was not presented below and a determination of questions of fact and law which were not litigated below because Valerio made no attempt to properly litigate them. The cases cited by Valerio have no legal significance because they were not made part of the record below. Even though this court belatedly elected to take judicial notice of the exhibits, that effort does not allow this court to consider the exhibits as evidence or as a basis to

determine whether the procedural bar found in NRS 34.810 is adequate.

In his opposition to Respondents' motion to dismiss several of Valerio's claims because they were procedurally barred, Valerio's sole reference to any purported "inadequacy" of Nevada's procedural bar is found in Appellant's Appendix (hereinafter App.) at 76-81. Valerio, apart from reciting some law with respect to "adequacy," presented no evidence whatever to support his contention. Indeed, Valerio's contention was not that the Nevada Supreme Court inconsistently applied the procedural bars found in NRS 34.810 or any other Nevada procedural bar. Rather, Valerio's argument was that the statute itself was a violation of due process because it presumed "that any and every claim presented in a second or successive petition would necessarily have been decided on the merits if it had not been raised in a prior proceeding and by concomitantly presuming that any claim not decided on the merits in a prior proceeding was not raised for reasons constituting an abuse of the writ." *See* App. at 77. As Respondents noted in their reply, "Valerio does not contest that Nev. Rev. Stat. 34.810 is consistently or regularly applied to all constitutional claims. He also does not present any evidence that the procedural default rule is not consistently or regularly applied to the types of constitutional claims in his second petition." *See* CR 47 at 2.

A state procedural bar is presumptively adequate. *Harris v. Reed*, 489 U.S. 255, 262 (1989); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). NRS 34.810 is

the state procedural rule relied upon by the state district court and the Nevada Supreme Court to bar consideration of Valerio's claims. CR 30, Exhibit YYY. Valerio presented no evidence below to support his naked statement below that NRS 34.810 is not an adequate state procedural bar. CR 42. The burden was on him to present such evidence to rebut the presumed adequacy of the state procedural bar. *Dugger v. Adams*, 489 U.S. 401, 410, n.6 (1989), *Paradis v. Arave*, 954 F.2d 1483, 1493 (9th Cir. 1992), vacated on other grounds, 507 U.S. 1026 (1993); *Zichko v. Idaho*, 247 F.3d 1015, 1021 (9th Cir. 2001). Valerio's failure leaves this court with no alternative but to uphold the presumption that NRS 34.810 is an adequate procedural bar. *Dugger*, *Paradis*, and *Zichko*[2], supra.

Fed. R. App. P. 10(a) provides as follows: "Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases." This Court's Rule 10-2 provides, in pertinent part: "Pursuant to FRAP 10(a), the complete record on appeal consists of: ... (b) the district court clerk's record of original pleadings, exhibits and other papers filed with the district court ('clerk's record')." Ninth Cir. R. 10-2.

[2] To the extent that *Zichko* can be relied upon to suggest that this court can search for evidence that a state procedural bar has not been consistently applied, *Zichko* is incorrect.

In *Kirshner v. Uniden Corporation of America*, 842 F.2d 1074, 1077 (9th Cir. 1988), this Court held that, "[p]apers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal." *See also United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir.1979)(affidavits that "were not part of the evidence presented to the district court" would not be considered on appeal).

The "exhibits" offered by Valerio to support his belated effort to rebut the presumption that the procedural bar found in NRS 34.810 is adequate are not properly before this Court. *Kirshner*, 842 F.2d at 1076-77; *see also Walker*, 601 F.2d at 1055 ("We are here concerned only with the record before the trial judge when his decision was made.")(emphasis added); *Heath v. Helmick*, 173 F.2d 156, 156-57 (9th Cir.1949) (striking from record on appeal papers that were filed in district court after judgment from which appeal was taken)("The cause must be tried here upon the record made at the original trial."). Therefore, this Court should ignore the "exhibits" and give them no consideration in adjudicating this appeal. *See Watson v. Rhode Island Ins. Co.*, 196 F.2d 254, 256 (5th Cir. 1952)(court refuses to consider grounds for reversal evidenced in documents that have been stricken from record on appeal); *Heath*, 173 F.2d at 157 (court gives no consideration to stricken materials in disposing of appeal).

In its orders, the district court did not address Valerio's argument, probably

because it was patently absurd. This court must examine this case on the basis of the record before the federal district court. Such proper examination can only lead to the conclusion that Valerio did not rebut the presumption of the bar's adequacy. The record on appeal requires this court to affirm the federal district court's decision.

D. The Principles Of Law Applicable To A Determination Of The Adequacy Of A Procedural Bar And The Legal Significance Of The "Exhibits".

Where a petitioner fails to comply with a state procedural requirement, and the failure provides adequate and independent grounds for the state court's denial of relief, federal review of the issue will be barred where the state court has expressly relied on procedural default. *See Harris v. Reed*, 489 U.S. 255 (1989); *Murray v. Carrier*, 477 U.S. 478 (1986); *Wainwright v. Sykes*, 433 U.S. 727 (1977).

For a state procedural rule to be "adequate" to foreclose federal review, it must be "strictly or regularly followed." *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (internal quotations omitted). In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established[3] at the time of the petitioner's purported default. *Wells v. Mass*, 28 F. 3d 1005, 1010 (9th Cir.1994). The federal courts will limit their search for uniformly applied default to the same type of claim

[3] That the procedural bar(s) established by NRS 34.810 were well-established at the time of Valerio's default is beyond cavil. NRS 34.810 became law in 1985.

and will only ask whether the actual application of the default rule to all similar claims has been even-handed "in the vast majority of cases." *Dugger v. Adams*, 489 U.S. 401, 410-12, n.6 (1989); *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996). Not imposing the bar in one case does not demonstrate that the bar is not invoked in the vase majority of cases under *Dugger, supra. Shumway v. Payne*, 223 F.3d 982, 989 (9th Cir. 2000). Likewise, an occasional act of grace does not render a state rule inadequate to support a procedural bar. *Andrews v. Deland*, 943 F.2d 1162, 1190 (10th Cir. 1991). *See also Scott v. Mitchell*, 209 F.3d 854, 869 (6th Cir. 2000); *Byrd v. Delo*, 942 F.2d 1226 (8th Cir. 1991); *Prihoda v. McCaughtry*, 910 F.2d 1379 (7th Cir. 1990); and *Amos v. Scott*, 61 F.3d 333, 342 (5th Cir. 1995), *cert. denied* 516 U.S. 1005 (1995).

A state procedural rule enjoys a presumption of adequacy when the state court expressly relies on it in deciding not to review a claim for collateral relief. *Harris v. Reed*, 489 U.S. 255, 262 (1989); and *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988).

The federal court will limit itself to considering claims of inconsistency in a default to that particular default that is at issue and the court will not consider the alleged inconsistency in other defaults that are not at issue. *Dugger*, 489 U.S. at 410 n.6 (1989). *See also Moran v. McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996).

See 1985 Statutes of Nevada 1232. Valerio murdered his victim in 1986.

The test for adequacy is whether the state procedural rule has been "strictly or regularly applied evenhandedly to the vast majority of similar claims." *Amos v. Scott*, 61 F.3d 333, 339 (5th Cir. 1995), *citing Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989); *see also Reed v. Scott*, 70 F.3d 844, 846 (5th Cir. 1995). The "consistent or regular application" of a state's procedural default rules does not require undeviating adherence to such rule admitting no exception. *Dugger*, 489 U.S. at 410 n.6 (1989).

The fact that the application of a rule requires the exercise of judicial discretion does not render the rule inadequate to support a state decision. *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996), *cert. denied*, 519 U.S. 1001 (1996). This court has expressly rejected the characterization that a discretionary doctrine may never be an adequate procedural bar, holding that judicial discretion may be applied consistently when it entails "the exercise of judgment according to standards, at least over time, can become known and understood within reasonable operating limits." *Id. See also Wood v. Hall*, 130 F.3d 373, 376-377 (9th Cir. 1997), *cert. denied* 523 U.S. 1129 (1998) and *Kibler v. Walters*, 220 F.3d 1151, 1153 (9th Cir. 2000).

The application of a state procedural bar is a matter of state law; this court cannot consider whether the state court properly applied its default rules to the petitioner's facts. *Poland v. Stewart*, 151 F.3d 1014, 1018 (9th Cir. 1998); *Wood v.*

Naturally, Valerio's default occurred after 1986.

Hall, 130 F.3d 373, 378-79 (9th Cir. 1997), *cert. denied* 523 U.S. 1129 (1998); and *Sweet v. Delo*, 125 F.3d 1144, 1151 (8th Cir. 1997), *cert. denied* 523 U.S. 1010 (1998). As noted above, a state's interpretation of its own law is binding on a federal court in a habeas proceeding.

Even if a state procedure is available in limited circumstances, a petitioner must convince the federal court that his case is one of the exceptional cases the state court would consider to avoid a procedural default. *Kennedy v. Delo*, 959 F.2d 112, 116 (8th Cir. 1992), *cert. denied* 506 U.S. 857 (1992). And the existence of a special exception does not indicate that the rule is not routinely applied or that the exceptions are applied irregularly or arbitrarily. *See Jimmy Swaggart Ministeries v. Brd. Of Equalization*, 493 U.S. 378, 398-99 (1990); *Matthews v. Evatt*, 105 F.3d 907, 914-16 (4th Cir. 1997), *cert. denied* 522 U.S. 833 (1997); *Wyldes v. Hundley*, 69 F.3d 247, 252-53 (8th Cir. 1995), *cert. denied* 517 U.S. 1172 (1996); *Sloan v. Delo*, 54 F.3d 1371, 1378-80 (8th Cir. 1995); *Smith v. Dixon*, 14 F.3d 956, 972-973 (4th Cir. 1994) (en banc) *cert. denied* 513 U.S. 841 (1994).

"A state's misapplication of its habeas corpus rules is not cause for default," because "a federal court may not re-examine a state court's interpretation and application of state law." *Wood v. Hall*, 130 F.3d 373, 379 (9th Cir. 1997), *cert. denied* 523 U.S. 1129 (1998).

1) The Nevada Supreme Court has on several occasions declared that it

consistently applies Nevada's procedural bars, including NRS 34.810, and has done so in the context of capital litigation. The most recent declaration has come in *Pellegrini v. State*, 34 P.3d 519 (2001). That declaration also appears in Valerio's Exhibit 20 at 4-5, fn. 2; and in Exhibit 21 at 43, and settles a question of state law which is binding on this court. *Williams v. Taylor*, 529 U.S. 420 (2000).

Moreover, if this court is going take judicial notice of Valerio's exhibits for the purpose of determining whether or not Nevada's procedural bars are consistently applied in death cases, or, the proper question, whether the procedural bars actually applied in Valerio's case are strictly or regularly applied evenhandedly to the vast majority of similar claims, the Nevada Supreme Court's declaration is a factual finding binding on this court that can be rebutted only by clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). Suffice it to say that Valerio has not presented any evidence to the contrary, much less clear and convincing evidence.

2) This court does not have any jurisdiction to make a factual determination. If this court determines that the question whether or not the application of a state procedural bar is independent and adequate is a mixed question of law and fact, this court does not have jurisdiction to determine the fact(s) necessary to make that determination. *United States v. Duarte*, 1 F.3d 644, 649 (7th Cir. 1993); *Allied Chemical Corp. v. Hess Tankship Co.*, 661 F.2d 1044, 1050 n.12 (5th Cir. 1981).

3) A number of Valerio's exhibits have no legal significance to this case and do not apply to any analysis whether the procedural bar found in NRS 34.810 is adequate. These exhibits do not deal with the procedural bar that was applied to bar the subject claims in Nevada in Valerio's case. The federal court limits itself to considering claims of inconsistency in a default to that particular default that is at issue. The courts do not consider extraneous matters, such as the alleged inconsistency in other defaults that are not at issue. *Dugger*, 489 U.S. at 410 n.6 (1989). *See also Moran v. McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996). Therefore, Valerio's argument, that this court must examine procedural bars other than the one applied to Valerio's claims in order to determine whether the one applied to Valerio's claims is adequate, is incorrect. Thus, even if this court had jurisdiction and the other procedural impediments to consideration of the issues did not exist, Valerio still has misstated the question. The proper method to determine the adequacy of a state procedural bar is to examine only that procedural bar and determine whether the actual application of that default rule to all similar claims has been even-handed "in the vast majority of cases.

The procedural bar that was applied to bar consideration of Valerio's claims is found in NRS 34.810. CR 30, Exhibit YYY. The alleged inconsistent application of other defaults is not at issue and, therefore, Valerio's reliance on cases not involving the application of NRS 34.810 is misplaced. Thus, Exhibits 1-2, 1-3, 1-4, 1-6, 1-7, 1-

8, 1-9, 1-12, 1-14, 1-16, 1-17, 1-30, 3, 10, 11, 12, and 13 which discuss or relate to procedural bars other than NRS 34.810 are irrelevant.

Exhibits 1-5 and 1-7 are orders dismissing appeals from the dismissal of a post-conviction petition for writ of habeas corpus which contains no discussion of NRS 34.810 or the discussion of any other procedural bar. These exhibits are irrelevant. They do not show that the application of NRS 34.810 or any other procedural bar was even the subject of the appeal or whether or not the petitioner-appellant had sufficiently shown cause or prejudice was ever an issue in the appeal.

Exhibits 1-2, 1-3, 1-4, 1-6, 1-8, 1-9, 1-12, 1-16, 1-17, 3, 10, 11, 12 and 13 are also irrelevant because they all relate to actions brought under a law which is no longer in effect, former NRS Chapter 177. (This can be seen by the exhibit's specific reference to NRS Chapter 177, by its reference in the document to a "petition for post-conviction relief" which indicates that the proceedings were under NRS Chapter 177, or by its reference to the case number in the exhibit which indicates that the document relates to an action relating to NRS Chapter 177).

Exhibits 6, 7, 8, and 9 are pleadings or documents relating to a direct appeal and, therefore, are irrelevant since they do not apply to an analysis of NRS 34.810.

Only Exhibits 1-10, 1-11, 1-13, 1-15, 1-18, 1-19, 1-20, 1-21, 1-22, 1-23, 1-24, 1-25, 1-26, 1-27, 1-28, 1-29, 1-31, 1-32, 1-33 even discuss NRS 34.810. If this court is going to examine any of the exhibits, only these exhibits should be

considered, and, even then, subject to the other limitations presented by Respondents herein. This court should note that in those exhibits, the Nevada Supreme Court discusses not whether the bar was properly applied[4], but whether the petitioner-appellant had been able to show cause or prejudice under the statute sufficient to overcome the procedural bar. In those cases in which NRS 34.810 is discussed, the procedural bar is applied. In actuality, the Nevada Supreme Court is simply affirming or rejecting the district court's determination that what was offered as either cause or prejudice in the petitioner's attempt to overcome the procedural bar was not adequate. That has nothing to do with whether or not the bar itself is adequate. Valerio's exhibits provide no evidence that the NRS 34.810 procedural bar is inadequate. As noted above, "[A] state's misapplication of its habeas corpus rules is not cause for default," because "a federal court may not re-examine a state court's interpretation and application of state law." *Wood v. Hall*, 130 F.3d 373, 379 (9th Cir. 1997), *cert. denied* 523 U.S. 1129 (1998).

4) Several of Valerio's exhibits do not even discuss Nevada procedural bars and, therefore, are irrelevant. Exhibit 1-1 is a draft order dismissing a mixed federal habeas petition. Exhibit 2 is a copy of an order showing that the panel in *Petrocelli* took judicial notice of court records, but just what those records were is

[4] In fact, in none of the cases did the petitioner-appellant ever assert that the bar was improperly applied. In each case, the appellant argued either that he had

not reflected in the order. Exhibit 4 is a copy of a motion for a certificate of appealability. Exhibit 5 is a copy of a motion to strike the motion for the certificate of appealability found in Exhibit 4. Exhibit 6, 7 and 8 are briefs in a direct appeal and Exhibit 9 is the order dismissing that direct appeal, none of which has anything whatever to do with NRS 34.810 or its applicability.

5) The four pie charts presented in Exhibit 1-34 have no legal significance because other than naked and conclusory statements regarding what the pie charts purport to represent, no foundation has been presented for them. This court cannot determine the truth or falsity of the statements for which they are offered, the method of analysis used to construct the charts, the cases the charts or the "analysis" relies on, or the manner in which the conclusions were deduced.

6) The orders upon which Valerio relies in his attempt to show that NRS 34.810 is irregularly applied, do not show that NRS 34.810 has been irregularly applied to claims similar to those that were barred in Valerio's case. *Dugger*, supra; *Moran*, supra; *Emery v. Johnson*, 139 F.3d 191, 202 (5th Cir. 1998). Valerio's Grounds 4-8 and 11 presented claims that several pieces of evidence were improperly admitted at trial. Ground 10 presented a claim that the trial prosecutor committed misconduct during argument. Ground 12 presented a claim that the state improperly released the victim's automobile and that prevented the

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shown sufficient cause or prejudice, or both, to the lower court to overcome the

defense from checking to see if the keys found in Valerio's person fit that automobile. Grounds 16, and 18-24 presented claims of ineffective assistance of counsel. Ground 17 presented various claims of ineffective assistance of appellate counsel. The exhibits offered by Valerio disclose no irregular application to claims similar to those presented by Valerio.

7) Valerio's argument, that the Nevada Supreme Court has on occasion addressed the merits of claims even though they were also found to be procedurally barred, is of no consequence. A state procedural default will still bar federal habeas review if clearly and expressly invoked as a separate basis. *Harris v. Reed*, 489 U.S. 255, 264, n.10 (1989).

8) Examination of the exhibits that do discuss the procedural bars found in NRS 34.810, shows that in each case the petitioner-appellant had previously litigated a direct appeal, a post-conviction petition for relief, and/or a post-conviction petition for writ of habeas corpus or some combination thereof before he litigated the petition for post-conviction petition for writ of habeas corpus which is the subject of the appeal found in the exhibits. Without exception, in each case the procedural bar(s) found in NRS 34.810 was/were applied to claims which were not properly brought in the petition because the conviction was upon a plea of

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bar.

guilty[5], to those claims which could have been raised in an earlier proceeding[6], and/or to a second or successive petition in which the judge determined that it failed to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds were alleged, the judge found that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ[7]. In each case, the Nevada Supreme Court examined whether or not the petitioner-appellant had shown good cause and prejudice as required by NRS 34.810 in order to overcome the procedural bar.

In actuality, Valerio's argument that NRS 34.810 is not consistently applied is merely a request that this court reconsider the Nevada Supreme Court's determinations regarding what constitutes cause and/or prejudice under Nevada state law to overcome the procedural bar. What constitutes cause and prejudice in the state proceedings to overcome any state procedural bar is a question of state law which cannot be relitigated in this court. *Wood v. Hall*, supra.

The exhibits reflect just what the Nevada Supreme Court has repeatedly stated: The Nevada statutory procedural bars, in particular NRS 34.810, are consistently applied and the Nevada Supreme Court has been consistent in requiring good cause and actual prejudice to overcome the statutory procedural

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[5] NRS 34.810(1)(a)
[6] NRS 34.810(1)(b)
[7] NRS 34.810(2)

bars.

9) Valerio was ordered to address the legal significance of the "exhibits" that this court elected to take judicial notice of. Instead of writing his supplemental brief to such a discussion, Valerio has chosen to ignore this courts order by addressing other issues and presenting argument and cases beyond which this court has ordered. Those motions identified primarily as Section II of his brief including the footnotes therein and his references to other cases, and documents that this court has not taken judicial notice of, are irrelevant.

CONCLUSION

This court has no jurisdiction to consider the issues that are the subject of this court's order. Valerio's exhibits are of no legal significance for the reasons stated above. To the extent the exhibits have legal significance, they prove that the Nevada Supreme Court consistently applies the procedural bar that precluded consideration of Valerio's claims. Moreover, if this court were to consider the exhibits, the exhibits disprove Valerio's argument and prove that the Nevada Supreme Court has strictly or regularly applied evenhandedly to the vast majority of similar claims a procedural bar steeped in history and presently codified in NRS 34.810: that a claim that was not presented in the first available post-conviction proceeding or on direct appeal when it could have will be procedurally barred and

///

that bar may be overcome only by a showing of good cause for the failure to present the claim previously and prejudice.

RESPECTFULLY SUBMITTED this 19th day of December 2001.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Respondent's Supplemental Brief is:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 4,768 words and, pursuant to this court's order, does not exceed 20 pages ;

or

[ ] Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text);

or

[ ] In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

RESPECTFULLY SUBMITTED this 19th day of December, 2001.

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CERTIFICATE OF MAILING

I do hereby certify that I am an employee of the Office of the Attorney General and that on the 26th day of December, 2001, I served a true and accurate copy of the foregoing RESPONDENTS' SUPPLEMENTAL BRIEF by mailing via United States mail, first class, postage prepaid, to:

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO,

Petitioner-Appellant,

v.

JACKIE CRAWFORD, Director, et al.,

Respondents-Appellees.

Case No. 98-99033
D.C. No. CV-N-96-362-HDM

(DEATH PENALTY CASE)

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ESPIREDION VALERIO, Petitioner-Appellant, v. JACKIE CRAWFORD, Director, et al., Respondents-Appellees.	Case No. 98-99033 D.C. No. CV-N-96-362-HDM (DEATH PENALTY CASE)

I. THIS COURT HAS JURISDICTION TO EXPAND THE CERTIFICATE OF APPEALABILITY TO ALLOW IT TO CONSIDER THE INADEQUACY OF STATE DEFAULT RULINGS TO BAR FEDERAL CONSTITUTIONAL REVIEW OF MR. VALERIO'S CLAIMS

The state argues in its current supplemental brief that this Court has no jurisdiction to review the issue of the adequacy of Nevada's procedural default rules because that issue was not in the original certificate of appealability issued by the district court. The briefing previously submitted shows that this Court indisputably has the authority to expand the scope of the COA, and that current Circuit Rule 22-1, which was adopted after the appeal in Mr. Valerio's case was pending in this Court, cannot properly be used to bar expansion of the COA to allow consideration of this issue. Since the state offers no new argument on this point, no reply is necessary.

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II. THIS COURT MUST CONSIDER THE COURT RECORDS OF WHICH IT HAS TAKEN JUDICIAL NOTICE IN DETERMINING WHETHER THE NEVADA SUPREME COURT APPLIES DEFAULT RULES INCONSISTENTLY

The state does not address appellant's arguments that the adequacy of state procedural default rules to bar federal review is a question of law, see Couch v. Jabe, 951 F.3d 94, 96 (9th Cir. 1991) (whether state ruling rests on default grounds presents question of law); see also Morales v. Calderon, 85 F.3d 1387, 1389 n. 6 (9th Cir. 1996), which this Court reviews de novo on appeal. E.g., Fields v. Calderon, 125 F.3d 757, 759-760 (9th Cir. 1997); Morales v. Calderon, 85 F.3d 1387, 1389 n. 6 (9th Cir. 1996). The state cites no authority for its assertion that this Court has no power to address a purely legal issue for the first time on appeal, and the settled law is to the contrary. E.g., United States v. Flores-Payon, 942 F.2d 556, 558 (9th Cir. 1991).

The state's continuing objection to this Court considering the material of which it has taken judicial notice disregards this Court's obligation to conduct its own survey of the available state decisions in deciding the issue before it. See Fields v. Calderon, 125 F.3d 757, 761, 764 (9th Cir. 1997); Johnson v. Mississippi, 486 U.S. 578 (1988); Dugger v. Adams, 489 U.S. 401, 411 n. 6 (1989). The state also ignores the fact that the records of which this Court has taken judicial notice are not normal evidence that is subject to dispute: the published and unpublished dispositions of the

Nevada Supreme Court say what they say, and there can be no reasonable dispute about their terms; and the legal analysis focuses on whether those decisions show inconsistent or purely discretionary application of Nevada procedural default rules in general and with respect to the defaults that were invoked in Mr. Valerio's case. Nothing in the state's supplemental brief suggests why the pattern of inconsistency shown by the published and unpublished decisions should be ignored in this analysis.

III. THE STATE DOES NOT RESPOND TO THE MERITS OF APPELLANT'S ARGUMENTS SHOWING THAT THE NEVADA SUPREME COURT APPLIES ALL OF ITS DEFAULT RULES INCONSISTENTLY IN CAPITAL COLLATERAL CASES IN BOTH PUBLISHED AND UNPUBLISHED CASES

The state argues that the Nevada Supreme Court's decision in Pellegrini v. State, 117 Nev. ___, 34 P.3d 519 (2001), constitutes the state law on procedural default in Nevada which is binding on this Court, and that, because the Pellegrini decision asserts that the state courts do apply procedural default rules consistently, this Court cannot conclude otherwise. Resp. Supp. Br. at 3-4.

Appellant acknowledges that state courts have the final word on what state law is, and he has never argued otherwise: the law on that point is clear.[1] But the issue

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[1] E.g., Wood v. Hall, 130 F.3d 373, 378-379 (9th Cir. 1997); see also Smith v. Stewart, ___ U.S. ___, 2001 WL 1046498 (December 12, 2001) (per curiam) (certifying question of scope of state law exception to default rule without suggesting that state law controlled issue of adequacy of procedural default to bar review under federal law).

before this Court is not a question of state law: whether a state procedural default ruling is adequate to bar federal review is a question of federal law.[2] Thus, this Court is required to accept the Pellegrini decision as constituting the current state law on procedural default (however incomprehensible that decision may be in light of the Nevada Supreme Court's previous practices); but this Court cannot accept the Nevada Supreme Court's characterization of its dispositions as consistent: this Court's own analysis of that federal issue will show that the Nevada Supreme Court's dispositions are inconsistent and that its rules were not so clearly established at the time of Mr. Valerio's purported default to be adequate to bar review of his constitutional claims. Morales, 85 F.3d at 1392. The state does not even acknowledge this rule of law, so there is nothing on this point to which appellant can reply.

The state's argument on the merits also ignores most of the arguments made by appellant. The state does not attempt to offer a substantive distinction between petitioner's case, in which defaults were invoked, and cases like Hardison and Stevens in which the Nevada Supreme Court ignored defaults or excused them on grounds not recognized in appellant's case. See Supp. Brief of Petitioner-appellant

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[2] E.g., Sloan v. Delo, 54 F.3d 1371, 1379 (9th Cir. 1995); see Morales v. Calderon, 85 F.3d at 1392 ("we emphasize that the issue here is not whether the State is allowed to invoke its rule irregularly for its own purposes. The question is whether invocation of a state rule that is applied only randomly may preclude a federal court from entertaining a petitioner's federal claim on the merits.").

at 6-10; Second Supp. Br. of Petitioner-appellant at 8-12.[3] Nor does the state suggest a rational basis for the disparity in treatment in cases like Bejarano v. State (Bejarano I), 106 Nev. 840, 843, 807 P.2d 1388 (1990) (reviewing claims sua sponte on appeal from denial of post-conviction relief) and Bejarano v. Warden (Bejarano II), 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (reviewing one claim despite default applicable to all claims), in which the Supreme Court reviewed some claims but not others. See Supp. Br. of Petitioner-appellant at 9-12. As appellant has shown in the previous briefing, the Nevada Supreme Court has historically exercised the power to disregard all applicable default rules, including timeliness bars and bars based on failure to raise claims in earlier proceedings, as to any kind of claim and as to any stage of collateral proceedings. The point of this demonstration is that all the Nevada default rules - - including the specific ones that were invoked to bar appellant's claims - -

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[3] The state argues that Hardison, for instance, is not relevant because it arose under the post-conviction relief proceedings under former Chapter 177 and the Nevada Supreme Court did not invoke the default provisions of Chapter 34. Resp. Supp. Br. at 14. But this is precisely appellant's point: for no apparent reason, the Nevada Supreme Court reviewed the merits of Hardison's second petition without regard to the successive petition default rules, while it applied those default rules to appellant's case. See Valerio v. State, 112 Nev. 383, 387-388, 915 P.2d 874 (1976) (Chapter 177 petition is previous petition for purpose of successive petition bar of Chapter 34). The fact that Hardison's second petition was filed under Chapter 177 (which contained no provision at all allowing successive petitions) rather than Chapter 34 (which contained the successive petition default rules) proves only that the Nevada Supreme Court disregarded the lack of any authority for filing a second Chapter 177 petition as well as the default rules based on timeliness and successive petitions in Hardison.

have not been considered "rules" at all, but have been imposed or disregarded entirely in the Nevada Supreme Court's standardless discretion, and therefore that none of these rules can be adequate to bar federal review. The state's brief does not address this argument, and appellant submits that this Court should recognize that there is simply no argument for the state to make on this issue.

IV. THE STATE'S RELIANCE ON THE PELLEGRINI DECISION IS MISPLACED, BECAUSE PELLEGRINI ACKNOWLEDGES DISCRETIONARY LANGUAGE IN ITS PREVIOUS DEFAULT CASES, IT OFFERS NO RATIONAL EXPLANATION FOR THIS IRREGULAR APPLICATION OF DEFAULT RULES IN THE PUBLISHED CASES IT DOES DISCUSS, AND IT OFFERS NO EXPLANATION AT ALL FOR ITS DISREGARD OF PROCEDURAL RULES IN UNPUBLISHED DISPOSITIONS

The state relies on the Nevada Supreme Court's recent decision in Pellegrini as establishing that the court applies its default rules consistently. The Pellegrini decision in fact shows exactly the contrary: it acknowledges that the court's previous decisions suggest that its application of default rules is discretionary; and its attempt to analyze its previous decisions only highlights the confusion and inconsistency appellant has shown.

A. The Pellegrini court admitted that its decisions supported the position in this Court's decisions in McKenna and Petrocelli by suggesting that application of its default rules is discretionary, and its actual practice supports that position as well.

Most important, the Pellegrini court acknowledged that language in previous

decisions indicated that the Nevada courts had discretion to consider the merits of constitutional claims despite the existence of procedural bars. As a result, the court found it necessary to overrule Warden v. Lischko, 90 Nev. 221, 222-223, 523 P.2d 6 (1974) and disapprove language in Pertgen v. State, 110 Nev. 554, 560, 875 P.2d 361 (1994), and to hold explicitly that application of the post-1985 statutory default rules is mandatory. Pellegrini, 34 P.3d at 536. The Nevada Supreme Court's acknowledgment that its previous decisions suggested that application of its default rules was discretionary compels that conclusion that the default rules that the court now characterizes as mandatory were not "clearly established" at the time of the supposed default in Mr. Valerio's case. The court's treatment of Lischko and Pertgen in Pellegrini is parallel to the California Supreme Court's acknowledgment that it had applied its procedural rules in its discretion in In re Clark, 5 Cal.4th 750, 855 P.2d 729, 737 (1993); and this Court in part based its conclusion that California's pre-Clark default rulings were not adequate to bar federal review on the admission in Clark. Morales v. Calderon, 85 F.3d 1387, 1391-1393 (9th Cir. 1996). The admitted lack of clarity in the Nevada Supreme Court's decisions, combined with the court's actual practice, compels this Court to conclude, as it did in Morales, that the application of Nevada default rules at the time of Mr. Valerio's case were not sufficiently clearly established or regularly followed to be adequate to bar federal

review.

B. The Pellegrini court's analysis of its previous dispositions does not and cannot show that the application of its default rules has been consistent.

The state contends, however, that the Nevada Supreme Court did apply its default rules consistently before Pellegrini, and the court in Pellegrini essentially makes the same argument in response to this Court's decisions in McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995) and Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001). See 34 P.3d at 533-536. The court's actual practice tells quite a different story, however, and it supports the conclusion that the state law as applied by the Nevada Supreme Court has been neither clear nor consistent.

1. The unpublished dispositions.

First, the court, like the state in this case, provides no analysis whatsoever of its unpublished dispositions, like Hardison, in which it disregarded default rules entirely. While the Pellegrini court states that it has applied default rules in published and unpublished cases, 34 P.3d at 526 n. 10, that is not the issue: the question is whether it has also disregarded default rules, either in its unfettered discretion or on grounds upon which it has not disregarded defaults in other cases; and Mr. Valerio's briefing shows unequivocally that it has done so, most clearly in successive collateral proceedings in capital cases. The Pellegrini decision thus supports appellant's

argument: if application of the default rules is mandatory, as the Pellegrini decision states, 34 P.3d at 536, then the constitutional claims in Hardison could not have been addressed without a finding of cause to excuse the defaults, and there is no such finding; the lone claim reviewed on the merits in Bejarano II could not have been reviewed without a finding of cause, and there is no such finding; and the claims reviewed in the other unpublished cases cited by appellant, see Second Supp. Br. of Petitioner-appellant at 9-12, could not have been reviewed without findings of cause, and there are no such findings.

2. The published cases.

The Pellegrini court's efforts to fit its previous published decisions into its mandatory-application-of-defaults scheme further reveal that rationally harmonizing the court's various practices simply is not possible. The Pellegrini court's discussion of the Hill and Bennett cases, 34 P.3d at 526 n. 10, 536, supports appellant's arguments.

a. The Hill cases

The Pellegrini court, responding to the criticism that it addressed the merits of constitutional claims in Hill without making a finding of cause, noted that a discussion of cause in the published Hill decision was not necessary because the approval to file the second petition was contained in the court's unpublished order

dismissing the appeal in the first collateral proceeding. 34 P.3d at 536. This position does not address the arguments made by appellant here.

First, the problem is not absence of a finding of cause in the published Hill decision, but the absence of any such finding in the unpublished order. The unpublished order contains no discussion of cause at all and authorizes the filing of a successive petition because of "the unique circumstances of this case," a standard so vague that it has no discernable content at all.[4] See also Neuschafer, Supp. JN Ex. 4 (giving anticipatory authorization for filing second petition where first petition failed to state claim, rather than barring subsequent petitions).

Second, the Pellegrini analysis ignores the other disregard of procedural default rules in Hill. The court in Hill entertained claims on the merits that had been raised for the first time on appeal from the denial of the second post-conviction petition. The Hill court justified that review on the ground that the claims presented

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[4] Any case involving a death sentence has "unique" seriousness, and the court has cited "unique" circumstances in other cases without giving any hint as to what circumstances would meet that standard. See Bridges v. State, 117 Nev. ___, 6 P.3d 1000, 1010 (2000) (error could not have affected jury weighing of aggravating and mitigating factors under "unique circumstances" of case; only circumstance cited is lack of "compelling" mitigation); Chambers v. State, 113 Nev. 974, 985, 944 P.2d 805 (1997) (death penalty reduced as excessive for "vicious" crime due to "unique circumstances" of case, where defendant intoxicated and killing resulted from "emotionally charged confrontation" in which defendant "could have been reacting from anger" (emphasis supplied); see also Holloway v. State, 117 Nev. ___, 6 P.3d 987, 994 (2000) (court must review all death sentences carefully due to "unique" severity of penalty).

constitutional issues and the record was sufficiently developed to allow review. Hill v. State, 114 Nev. 169, 171, 953 P.2d 1077 (1998). As appellant previously showed, there is no discussion in Hill of the bar for failure to raise the claims earlier, see Nev. Rev. Stat. § 34.810(1)(b), in either the first or the second post-conviction petitions; and the court's action in Hill is thus plainly inconsistent with its position in Pellegrini that application of that bar is mandatory. While the Pellegrini court takes this Court to task for supposedly misreading the Pertgen decision, Pertgen v. State, 110 Nev. 554, 560, 875 P.2d 361 (1994), as allowing discretionary review of claims in collateral proceedings, the Supreme Court did exactly that in Hill: it reviewed claims raised for the first time on the appeal from the denial of collateral relief on the same ground that it reviewed claims raised for the first time on direct appeal in Pertgen.[5] In short, while the Pellegrini court may prescribe what the state law now is, no amount of legerdemain can fit its previous decisions into its current scheme.

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[5] The Pellegrini decision is equally silent about the justification for the court's review of constitutional claims sua sponte on appeal from the denial of collateral review, in Bejarano I, 106 Nev. at 843, and about its review of a constitutional claim, that was subject to the same bars as the claims to which the court actually applied the default rules without any explanation for the disparity in treatment, in Bejarano II, 112 Nev. at 1471 n. 2. Similarly, the Pellegrini court attempts to harmonize the apparently inconsistent applications of default rules as a result of the changing procedure for raising claims of ineffective assistance of counsel, 34 P.3d at 532-535; but it does not attempt to explain the cases in which it has addressed claims other than those of ineffective assistance. See Second Supp. Br. of Petitioner-appellant at 9, 11-12.

b. The Bennett case

The Pellegrini court's treatment of Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995), also exposes the futility of trying to harmonize the court's actual practice with its ostensible rules. In Pellegrini, the court stated that it had excused an alleged timeliness default in Bennett because it "concluded that good cause excused the procedural bar at NRS 34.726(1) for untimely filing of a second petition where the first petition had been timely filed, but not pursued by counsel, and any delay in filing the second petition was not the petitioner's fault." Pellegrini, 34 P.3d at 526 n. 10. The language used in Bennett and Pellegrini, noting that any delay was "not the petitioner's fault," 34 P.3d at526 n. 10, refers to the language of the current one-year filing statute, Nev. Rev. Stat. § 34.726(1); but the Bennett proceeding was commenced in 1990, so § 34.726(1), which applies only to petitions filed after January 1, 1993, could not apply. During the period between 1987 and 1993, appointment of counsel in collateral proceedings was not mandatory even in capital cases, and the court has held that counsel's ineffectiveness cannot establish cause (regardless of the petitioner's lack of "fault") unless appointment of counsel is mandatory. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997); Bejarano II, 112 Nev. at 1470.

The Pellegrini decision, as it interprets Bennett, contradicts the Crump rule by

assuming that a finding of cause existed in Bennett through the court's refusal to "penalize" the petitioner for counsel's actions, even when counsel's derelictions took place in a pre-1993 proceeding. See also Stevens, JN Ex. 1-17; Second Supp. Br. of Petitioner-appellant at 16-17. The Pellegrini decision thus leaves the issue of what constitutes cause more confused than it was before: the Pellegrini court now appears to interpret counsel's error which did not involve the petitioner's "fault" as "cause" in a pre-1993 collateral proceeding which is not a theory it recognized in Bejarano II or in appellant's case. In light of Pellegrini's gloss on Bennett, no one can now say for certain whether an error by counsel in a pre-1993 collateral proceeding can constitute cause or not.

Similarly, the Bennett decision did not find cause to excuse the failure to raise claims in earlier proceedings: it found apparent merit to the state's invocation of a default on that ground, but it declined to address the procedural issues and stated that it would "choose" - - using clearly discretionary language - - to address the claims on the merits anyway. 111 Nev. at 1103. The Pellegrini court's emphasis on the supposedly mandatory character of the default rules, 34 P.3d at 536, makes no reference to this ability to "choose" to address claims without resolving procedural issues, any more than it addressed its sua sponte review of issues on collateral review in Bejarano I, 106 Nev. at 843. These decisions are antithetical to the existence of a

"clearly established" rule that imposition of procedural defaults ~~is~~ mandatory, and the Pellegrini decision offers no rational way to harmonize them.

C. Conclusion.

The Pellegrini court criticizes this Court's Petrocelli and McKenna decisions and purports to show that its administration of default rules has been consistent. While the Pellegrini decision may establish the state law "for its own purposes," Morales, 85 F.3d at 1392, it exposes the fact that its default rulings are not consistent: it does not address the unpublished decisions in which it disregards defaults;[6] and it cannot harmonize what the court has actually said in its previous decisions with its theory of mandatory imposition of defaults. Under these circumstances, this Court can conclude only that the Nevada Supreme Court applied its default rules in its standardless discretion at the time of Mr. Valerio's alleged default, as it has applied those rules inconsistently throughout their existence.

IV. CONCLUSION

For the reasons stated above and in the briefing previously submitted, this Court should hold that the default rulings imposed in Mr. Valerio's case are not

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[6] It is ironic that the Pellegrini court held that imposition of default rules was mandatory within a month of the disposition in Wade, in which it sua sponte excused a default on a ground that it had previously refused to recognize. See Supp. JN Ex. 5; Second Supp. Br. of Petitioner-appellant at 14-15.

adequate to bar federal review it should therefore and reverse the judgment of the district court.

RESPECTFULLY SUBMITTED this 18th day of January, 2002.

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I hereby certify that I am an employee of the Office of the Federal Public Defender and on this 18th day of January, 2002, I served a copy of the foregoing **SUPPLEMENTAL REPLY BRIEF OF PETITIONER-APPELLANT** by mailing a copy thereof to:

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